

DOCKET



SUPREME COURT

OF THE UNITED STATES

No. 11-9540

Title: Matthew Robert Descamps, Petitioner

v.

United States

Docketed: March 28, 2012

Lower Ct: United States Court of Appeals for the Ninth Circuit

Case Nos.: (08-30013)

Decision Date: January 10, 2012

Questions

Presented

~~~Date~~~ ~~~~~Proceedings and Orders~~~~~

Mar 19 2012 Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed.  
(Response due April 27, 2012)

Apr 18 2012 Order extending time to file response to petition to and including May 29, 2012.

May 21 2012 Order further extending time to file response to petition to and including June 28, 2012.

Jun 28 2012 Brief of respondent United States in opposition filed.

Jul 12 2012 DISTRIBUTED for Conference of September 24, 2012.

Jul 17 2012 Supplemental brief of petitioner Matthew Robert Descamps filed. (Distributed)

Aug 31 2012 Motion to proceed in forma pauperis is granted. The petition for a writ of certiorari is  
GRANTED limited to Question 1 presented by the petition.

Sep 11 2012 Motion to appoint counsel filed by petitioner Matthew Robert Descamps.

Oct 3 2012 Motion DISTRIBUTED for Conference of October 26, 2012.

Oct 5 2012 The time to file the joint appendix and petitioner's brief on the merits is extended to and  
including October 24, 2012.

Oct 5 2012 The time to file respondent's brief on the merits is extended to and including December  
3, 2012.

Oct 18 2012 Motion to file volume II of the joint appendix under seal filed by petitioner Matthew  
Robert Descamps.

Oct 24 2012 Joint appendix filed. (Volume 1 of 2) (Statement of costs filed)

Oct 24 2012 Brief of petitioner Matthew Robert Descamps filed.

Oct 29 2012 Motion to appoint counsel filed by petitioner GRANTED. Dan B. Johnson, Esquire, of  
Spokane, Washington, is appointed to serve as counsel for the petitioner.

Oct 29 2012 Motion DISTRIBUTED for Conference of November 20, 2012.

Oct 31 2012 SET FOR ARGUMENT ON Monday, January 7, 2013.

Oct 31 2012 Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.

Nov 16 2012 CIRCULATED.



Nov 26 2012 Motion to file volume II of the joint appendix under seal GRANTED.

Dec 3 2012 Brief of respondent United States filed. (Distributed)

Dec 5 2012 Record recieved from U.S.C.A. for 9th Circuit. (1 box).

Dec 5 2012 Record from U.S.D.C. for Eastern District of Washington is electronic. There is 1 sealed envelope received from U.S.C.A. for 9th Circuit) that is a part of U.S.D.C. record.

Dec 27 2012 Reply of petitioner Matthew Robert Descamps filed. (Distributed)

Jan 7 2013 Argued. For petitioner: Dan B. Johnson, Spokane, Wash. (Appointed by this Court.) For respondent: Benjamin J. Horwich, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

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**PETITION  
FOR  
WRIT OF  
CERTIORARI**

No. \_\_\_\_\_

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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MATTHEW ROBERT DESCAMPS,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS- NINTH CIRCUIT

**PETITION FOR WRIT OF CERTIORARI**

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### QUESTION(S) PRESENTED

The California Burglary Statute Section 459 does not require as an element that a burglar "enter or remain unlawfully in a building". The Ninth Circuit held that it could determine whether this "missing element" was shown to have been proven by applying the modified categorical approach.

The issues presented are as follows:

- 1- Whether the Ninth Circuit's ruling in *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011), (*En Banc*) that a state conviction for burglary where the statute is missing an element of the generic crime, may be subject to the modified categorical approach, even though most other Circuit Courts of Appeal would not allow it.
- 2- Whether is it time for this Court to overrule *Almandez-Torres v. United States*, 523 U.S. 224 (1998), apply *Apprendi v. New Jersey*, 530 U.S. 224 (2000), and require an Indictment and trial on the issue of application of the Armed Career Criminal Act.
- 3- Whether the Ninth Circuit's ruling in the instant case was in derogation of the requirements in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005).

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**MATTHEW ROBERT DESCAMPS**

**Petitioner,**

**-v-**

**UNITED STATES OF AMERICA,**

**Respondent**

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT**

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Petitioner, Matthew Robert Descamps, respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

The Ninth Circuit, in an unpublished decision, affirmed Petitioner's conviction and sentence for Felon in Possession of a Firearm/Ammunition, in violation of 18 U. S. C. Section 922(g)(1). The opinion of the United States Court of Appeals appears at Appendix "A" to the Petition and is unpublished.

The opinion of the United States District Court appears at Appendix "B" to the Petition and is unpublished.

**STATEMENT OF JURISDICTION**

The date on which the United States Court of Appeals for the Ninth Circuit decided and affirmed the District Court in Petitioner's case was January 10<sup>th</sup>, 2012. The Court of Appeals had jurisdiction pursuant to 28 U. S. C. Section 1291. No petition for rehearing was filed in this case. The jurisdiction of this court is invoked under 28 U. S. C. Section 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

U. S. Const. amend. V;

U. S. Const. amend. VI;

## **FEDERAL STATUTES**

8 U.S.C. § 1326(b)(2);

8 U.S.C. §§ 1101(a)(43);

8 U.S.C. §§ 1227(a)(2)(A)(iii);

18 U. S. C. Section 922(g)(1);

18 U. S. C. Section 924(e)(2)(B);

18 U. S. C. Section 924(e)(2)(B)(i);

18 U.S.C. § 924(e);

28 U. S. C. Section 1291;

28 U. S. C. Section 1254(1);

## **FEDERAL RULES AND REGULATIONS**

8 C.F.R. § 212.2(a);

U.S.S.G. § 4B1.1;

U.S.S.G. § 2L1.2(b)(1)(A);

## **STATE STATUTES**

Cal. Penal Code Sect. 459;

(For text of the cited provisions, see Appendix C (Sup. Ct. R. 14.1(f) & (i)(v)).

## STATEMENT OF THE CASE

The Defendant was arraigned on May 16<sup>th</sup>, 2005 and entered a not guilty plea to an Indictment charging him with Count I: Felon in Possession of a Firearm/Ammunition, in violation of 18 U. S. C. §922(g)(1). [CR 16; CR 18-Minute entry]. After incompetency proceedings, and an interlocutory appeal, on April 26<sup>th</sup>, 2007, the court entered an Order finding the defendant competent to stand trial. (CR 237). On December 19<sup>th</sup>, 2005, the government filed a document entitled: "Information to Establish Prior Convictions". [CR 96, ER 33-34]. Based upon the aforementioned Information, the Government manifested its intention to pursue a sentencing enhancement based upon the Armed Career Criminal Act, "ACCA") 18 U.S.C. § 924(e). The defendant proceeded to a jury trial and was convicted, as charged, on September 13<sup>th</sup>, 2007. (CR 352-Jury Verdict). The Pre-sentence Investigation Report included a recommendation for a sentencing enhancement under § 924(e)(1). On December 28<sup>th</sup>, 2007, the Government submitted its Notice of Review of the Pre-Sentence Investigation Report and Memorandum in Support of Armed Career Criminal Application [CR 403], together with attached exhibits. The Defendant objected to application of the Armed Career Criminal Act in his Defendant's Objections to Pre-Sentence Report and Sentencing Memorandum, filed on December 27<sup>th</sup>, 2007. [CR 402].

On January 4<sup>th</sup>, 2008, the court found that the defendant was an Armed Career Criminal under Sect. 924(e)(1), and Findings and Conclusions were filed on January 9<sup>th</sup>, 2008. [CR 406-Appendix B-pages 6-14]. The district court sentenced the Defendant to 262 months on Count 1, within the guideline range as calculated, along with 5 years of Supervised Release, among other conditions. The Judgment and Sentence was filed on January 14<sup>th</sup>, 2008. [CR 407, ER 10-15]. The defendant filed an appeal. [CR 354-by defendant; CR 405- by defense counsel; ER 85-94].



At the time of sentencing, the defendant argued that it would violate his constitutional rights (Fifth and Sixth Amendment) under the United States Constitution to proceed with the Armed Career Criminal Act sentencing, unless, and until, he was Indicted and the charge proven to a jury, beyond a reasonable doubt, as to whether his prior convictions counted as predicate felony convictions. In addition he argued that this objection took place at sentencing. [Transcript of Sentencing- CR 426, p. 4; ER 16-30].

Furthermore, the defendant argued that the government could not prove that the two Third Degree Assault charges, the Second Degree Burglary, or the Felony Harassment charges qualified as predicate felonies, thus, there would then have been only one qualifying conviction and the Armed Career Criminal Act would not be applicable to the defendant. [CR 426, ER 16-30].

On January 4<sup>th</sup>, 2008, the Court held a sentencing hearing. The government proffered exhibits in support of the contention that ACCA should be applied. Exhibits B-1 to B-4 were included below as ER (Excerpt of Record- 35-57, and concerned a Burglary conviction filed on December 4<sup>th</sup>, 1978, in California. (Appendix "D" herein- App. 29-51); Exhibits E-1 to E-3 were included below as ER 58-84, and concerned a felony harassment conviction filed on December 5<sup>th</sup>, 2000, in Pend Oreille County, Washington. The Government and United States Probation alleged that the Defendant was an Armed Career Criminal based on the following guilty plea convictions. First Degree Robbery October, 1977 (California) (Exhibits A1 through A4- CR 403); Second Degree Burglary-1978 (California) (Exhibits B-1 through B-4- CR 403)(Appendix "D" herein- App. 29-51); Felony Harassment, March, 2000- Pend Oreille County, WA (Exhibits E-1 through E-3); Third Degree Assault-October, 1991- Stevens County, WA

(Exhibits C-1 through C-4-CR 403); Third Degree Assault-November, 1998- Spokane County, WA (jury verdict)(Exhibits D-1 through D-4, CR 403).

The Defendant objected to the ACCA enhancement based upon the aforementioned convictions, specifically, to the convictions obtained by plea agreement for Burglary in the Second Degree in California in 1978, both Third Degree Assault convictions, and the Felony Harassment conviction. The Court ruled that the two Third Degree Assault convictions did not count as violent felonies under ACCA, but the parties agreed that the Robbery conviction counted. The major issue presented was whether the California Burglary and/or the conviction for Felony Harassment should be counted under ACCA. The court held that they both did count and with the Robbery conviction found that ACCA applied. (CR 406; Appendix B- App. 6-14).

Furthermore, the defendant argued that the Second Degree Burglary conviction from California should not qualify as a predicate conviction due to the lack of evidence to establish that the conviction involved generic Burglary. The court ruled against the defendant on this issue both orally and in the Judgment and Sentence with findings related to the Pre-Sentence report and objections thereto. (CR 406; App. B- pages 6-14; Appendix C- App. 15-28) Furthermore, the Court ruled that there was no need for a jury to determine the facts related to the convictions being used to establish ACCA qualification. (CR 406; App. 15-28).

On January 10<sup>th</sup>, 2012, the Ninth Circuit Court of Appeals filed an opinion affirming Petitioner's conviction and sentence. (Appendix A). On March 9<sup>th</sup>, 2009, the Petitioner had filed a supplemental letter briefing and specifically argued that the fact that the California Burglary Code Sect. 459 did not include the element of entering or remaining unlawfully resulted in it not qualifying as a predicate offense under ACCA since it did not meet the

definition of generic burglary and that the previous ruling in *United States v. Aguila-Montes*, No. 05-50170, \_\_\_ F.3d \_\_\_, 2009 WL 115727 (January 20<sup>th</sup>, 2009), precluded use of the California burglary conviction). (Docket Entry: 6838115- Ninth Circuit Court of Appeals), reversed, *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011), *En Banc*. The Court applied *Aguila-Montes* to Petitioner's case, even though the Burglary charge was indivisible due to missing an element of the generic crime. In addition, the Court held that an Indictment and trial were not required either as to application of the Armed Career Criminal Act.

### SUMMARY OF ARGUMENT

The Ninth Circuit's decision in this case warrants review by the Court for several reasons. First, the Court of Appeals held it was proper for it to analyze Mr. Descamp's prior state conviction under the second-stage, or modified categorical approach of *Taylor* to determine the categorical status of the conviction. It so held, even though the statute in question, Cal. Penal Code §459, is not a divisible statute, that is, one that contains multiple subparts, some of which qualify as categorical offenses and some not. Section 459 charges a single offense that is categorically overbroad and also is missing the generic element of "entering or remaining unlawfully".

By holding that the modified categorical approach applies to an indivisible statute like § 459, the decision diverges from the jurisprudence of those Circuits that require the statute be divisible before the modified categorical approach applies. *See, e.g., Gor v. Holder*, 607 F.3d 180, 192 (6<sup>th</sup> Cir. 2010); *United States v. Woods*, 576 F.3d 400, 404 (7th Cir. 2009); *United States v. Rooks*, 556 F.3d 1145, 1147 (10th Cir. 2009); *United States v. Gonzalez-Terrazas*, 529 F.3d 293, 297 (5th Cir. 2008); *Nijhawan v. Attorney General*, 523 F.3d 387, 393 (3d Cir. 2008). Section 459 does not divisibly penalize qualifying and non-qualifying offenses and so is not

subject to the second stage of categorical inquiry, since it is missing an element of the generic offense, entirely. There are a number of other locations that are also included in the statute, including tents, etc. By holding otherwise, the decision here manifestly conflicts with these other circuit courts on an important matter of federal law, the proper operation of the categorical analysis. This case therefore merits review. Sup Ct. R. 10(a).

Second, review is warranted, because the *manner* in which the Court of Appeals conducted the modified categorical analysis here conflicts with the Court's requirements under *Shepard v. United States*, 544 U.S. 13 (2005). In *Shepard*, the Court held that to satisfy the required showing at the second stage of *Taylor v. United States*, 495 U.S. 575 (1990), the record of a guilty plea must show the defendant "necessarily admitted elements of the generic offense" needed to bring the overbroad, state offense within the federal enhancement. 544 U.S. at 26. But, here, the record did not show that Mr. Descamps "necessarily admitted elements of the generic offense," since the pertinent statement in the plea agreement does not necessarily show the defendant entered or remained unlawfully since such a distinction was not an element, thus, not relevant to the plea. The Court of Appeals' contrary holding conflicts with the Court's description of the second-stage requirements in *Shepard*, meriting review on this important federal question. Sup. Ct. R. 10(c).

Petitioner contends that the Ninth Circuit in *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011), *En Banc*, deviated from the rulings of the majority of the other Circuit Courts with respect to using the modified-categorical approach when the statutory definition of the subject conviction under consideration was missing an element of the generic definition of Burglary, as defined in *Taylor vs. United States*, *Supra*. Petitioner contends that the ruling by the Ninth Circuit is in violation of rulings of this court, and exceeds the limited use of the Modified

Categorical approach. In cases where the statute of conviction does not include as an element, the generic element required to qualify for ACCA, the Court should establish a national standard and not allow use of the modified categorical approach. Doing so results in fact finding that is in derogation of this Court's rulings and violates constitutional rights of the defendant. This Court should accept Certiorari, reverse the Ninth Circuit's ruling in *United States v. Aguila-Montes De Oca*, *Supra.*, apply the ruling to the instant case, and hold that the 1978 California Burglary conviction is not an ACCA predicate. The case should then be remanded for a re-sentencing without the ACCA enhancement, to a maximum of ten years.

Additionally, in order to preserve his argument and because he believes it is time for this Court to overrule *Almanderez-Torres v. United States*, 523 U.S. 224 (1998), and apply *Apprendi v. New Jersey*, 530 U.S. 224 (2000), to the issue of application of the ACCA and require an Indictment and trial on the issue, he brings forth the subjoined argument, as well.

## **ARGUMENT- REASONS FOR GRANTING THE PETITION**

### **IV. Introduction**

The Ninth Circuit Court's decision in *United States v. Aguila-Montes De Oca*, *Supra.*, was wrongly decided and is out-of-step with the majority of the other Circuit Court's in how to handle missing element cases with respect to whether a subject conviction qualifies as an ACCA predicate. The Court should accept further review in order to set forth a national standard as to how a court should treat a case where the subject conviction is missing an element of the generic definition of the crime under consideration pursuant to ACCA, and hold that the modified categorical approach cannot be applied to crimes that have a missing element of the generic crime definition.

For purposes of determining whether a subject conviction qualifies as an ACCA predicate, the term “violent felony” is defined in 8 U. S. C. § 924(c)(2)(B), in pertinent part, as follows:

“...any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion...or otherwise involves conduct that presents a serious potential risk of physical injury to another.”

*Taylor v. United States* instructs sentencing courts assessing a criminal defendant’s prior conviction to employ a “categorical approach.” 495 U.S. 575, 600 (1990). Under that approach, courts are directed to consider the elements of the crime of conviction in general, not the conduct underlying the defendant’s conviction in particular. *Id.* at 602. When those elements and the requirements of the federal recidivist statute in question do not match, *Taylor* instructs that the categorical approach may be modified, but only “in a narrow range of cases where [the trier of fact] was actually required to find all the *elements* of [the] generic [crime].” *Id.* at 602 (emphases added). This “modified categorical approach,” must remain categorical, not factual or “circumstance-specific.” *Nijhawan v. Holder*, 129 S.Ct. 2294, 2298 (2009); see also *Taylor*, 495 U.S. at 600–02. The approach adopted in *Aguila-Montes* violates both the letter and the spirit of Supreme Court precedent. *Aguila-Montes* allows sentencing courts to “consider[ ] to some degree the factual basis” of a (possibly decades-old) prior conviction. *Aguila-Montes*, *supra*, at 935. So long as the sentencing court is “confident,” upon examining the “prosecutorial theory of the case” and “the facts put forward by the government” in the earlier proceeding, that the trier of fact was “required” (in a practical, but not legal, sense) to find facts that would satisfy the



generic crime, then it may enhance a defendant's sentence on that basis. *Id.* at 936–37. And the sentencing court must also where there was a guilty plea (as in this case), and thus no way to determine what “theory of the case” the nonexistent trier of fact must have adopted. Most crucially, the sentencing court need no longer confine itself to the facts related to the elements of the crime of conviction, even though the prior proceeding, whether ended with a jury verdict or a guilty plea, will have been concerned at bottom only with assessing those elements, and even though *elements* have long been the touchstone of the categorical and modified categorical approach. This blurring of the line between facts and elements, and the facts necessarily required by the elements, is a significant shift in the law beyond that espoused by this Court. “Elements” are those necessary and sufficient facts that, if proven (or admitted), support a conviction for a particular crime. *See United States v. Beltran-Munguia*, 489 F.3d 1042, 1045 (9th Cir.2007) (“To constitute an element of a crime, the particular factor in question needs to be a constituent part of the offense [that] must be proved *in every case* to sustain a conviction under a given statute.” (citation and quotation marks omitted, alterations in original)); *see generally Richardson v. United States*, 526 U.S. 813, 817 (1999) (“Calling a particular kind of fact an ‘element’ carries certain legal consequences.”). *Aguila-Montes*’ fact-based approach is irreconcilable with *Taylor* and its many Supreme Court progeny. *Taylor* warned that “the practical difficulties and potential unfairness of a factual approach are daunting,” and therefore rejected a factual approach, even though “[i]n some cases, the indictment or other charging paper might reveal the theory or theories of the case presented to the jury.” *Id.* at 601. A fact-based approach has even less traction in the guilty plea context. *See id.* at 601–02.

The Supreme Court has rejected the type of factual inquiry adopted in *Aguila-Montes*. *Nijhawan* said that “*Taylor*, *James*, and *Shepard*, the cases that developed the evidentiary list to

which petitioner points, developed that list for a very different purpose, namely that of determining *which statutory phrase* (contained within a statutory provision that covers several different generic crimes) covered a prior conviction." *Id.* at 2303 (emphasis added). In other words, the point of the inquiry was to see which statutory phrase the court invoked in convicting the defendant, not to determine precisely how the court believed the crime was committed in convicting the defendant. *Nijhawan* clearly holds that the modified categorical approach is used to determine under which provision of a divisible statute a defendant was convicted, and it cannot be used to find nonelemental facts. *Id.* at 2299-2303. The flaws in *Aguila-Montes* are amply displayed in the panel's application of it in this case. As discussed *infra* Mr. Descamps has demonstrated that his conviction did not necessarily require a breaking and entering. Rather, under California law, his plea would be acceptable even if facts did not establish that he "entered or remained unlawfully" in a building. The element was not necessary and essential to the charge and there would have been no reason for the Petitioner to contest the issue. The panel, however, proceeded to conduct, in essence, a "mini-trial" on the prior conviction. (App. at 1-5). The panel concluded that Descamps conviction necessarily rested on facts satisfying the element of entering or remaining unlawfully and relied on the statement of the Prosecutor that there was a breaking and entering.

This approach is devoid of the limitations discussed in *Nijhawan*, *ante*. *Johnson v. United States*, 130 S.Ct. 1265 (2010) dispels any doubt but that *Aguila-Montes* is fatally flawed. *Johnson* held that a conviction under Florida's divisible battery statute was not categorically a violent felony because the statute encompassed convictions for "any intentional physical contact, no matter how slight." *Johnson*, 130 S.Ct. at 1269-70 (citation and quotation marks omitted).



Such convictions, the Supreme Court held, lacked the “violent force” necessary to make a conviction thereunder a “violent felony” for purposes of the Armed Career Criminal Act, 18 U.S.C. §924(e)(2)(B). *See Johnson*, 130 S.Ct. at 1271. The dissenters objected that this holding would make it more difficult to remove noncitizens convicted under that statute and other “generic felony-battery statutes that cover both violent force and unwanted physical contact.” *Id.* at 1273 (characterizing dissenting opinion of Alito, J.). The Court responded:

“This exaggerates the practical effect of our decision. When the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not, the “modified categorical approach” that we have approved permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record....”  
*Id.* (citation and quotation marks omitted).

The panel decision’s application of *Aguila-Montes* does not determine which “statutory phrase” was used to convict Mr. Descamps. Rather, it used *Aguila-Montes* to, in effect, “re-try” the 1978 California burglary case against Mr. Descamps. That “retrial” was the first which ever occurred, since Mr. Descamps burglary conviction occurred by way of a guilty plea. Thus, *Aguila-Montes* was used to try a case which had never been tried in order to determine facts which were not needed as part of the guilty plea. *Taylor*, *Shepherd*, *Nijhawan* and *Johnson* do not authorize such a result. *Aguila-Montes* was wrongly decided, and should be overturned.

In *Taylor v. United States*, the Supreme Court established a categorical definition of burglary for purposes of section 924(e)(2)(B). Under *Taylor*’s categorical approach, the Government has the burden of establishing that three elements have been satisfied. *Id.* The required elements are as follows: 1) unlawful or unprivileged entry into, or remaining in; 2) a building or structure; and 3) with intent to commit a crime. *Id.* at 602.

Under *Taylor*, courts are required to compare the statutory elements of the defendant's prior offense with the elements required by the sentence enhancement law. *Id.* In addition, it is well accepted that the *Taylor* analysis applies not only to jury convictions but also when a defendant enters a plea of guilty. See, e.g., *United States v. Bonat*, 106 F.3d 1472, 1476 (9<sup>th</sup> Cir. 1997) (holding that an evaluation of the plea transcript is appropriate for determining whether a defendant's prior conviction meets the definition of generic burglary). See also, *Shepard v. United States*, *Supra*. The record must "unequivocally" establish that the defendant was convicted of the generic crime. *United States vs. Corona-Sanchez*, 291 F.3d 1021, 1211 (9<sup>th</sup> Cir. 2002)(en banc).

**V. The Decision here Conflicts with Multiple Circuit Courts on the Important Federal Question Whether an Indivisible Statute (Missing an Element) is Subject to the Modified Categorical Analysis Under *Taylor*.**

In *Taylor v. United States*, the Court adopted a method for determining when state convictions qualify as federal, predicate convictions for sentence enhancement and other purposes. That categorical approach limited the inquiry to a comparison of the elements of the state statute with those of the generic offense. See 495 U.S. at 602. However, *Taylor* also "recognized an exception to this 'categorical approach' only for 'a narrow range of cases where a jury . . . was actually required to find all the elements of' the generic offense." *Shepard*, 544 U.S. at 17 (quoting *Taylor*, 485 U.S. at 602). As *Shepard* emphasized, rejecting an expansive view of the corpus of evidence acceptable for this second-stage inquiry, "*Taylor* is clear that any enquiry beyond statute and charging document must be narrowly restricted to implement the object of the statute and avoid evidentiary disputes." *Id.* at 23 n.4.

Most circuit courts have dutifully sought to limit the scope of the second-stage inquiry by

applying the modified categorical approach only when the state statute at issue is “divisible,” meaning “when it describes multiple offense categories, some of which would be [federal, generic offenses] and some of which would not.” *United States v. Taylor*, 630 F.3d 629, 633 (7th Cir. 2010)(citation and internal quotation marks omitted). With a divisible statute, the courts may look to certain judicially noticeable documents to determine which sub-offense the defendant was actually convicted of, the overbroad offense or the narrow one. *See Rooks*, 556 F.3d at 1147.

By proceeding to the second-stage analysis of § 459, the Ninth Circuit violated this Court’s intention that inquiry beyond the strict categorical analysis be limited to certain exceptional circumstances. The decision likewise conflicts with the holding of multiple circuits that the modified categorical approach is properly available only when the state statute at issue is divisible. Because these conflicting holdings affect the uniform, national application of the *Taylor* analysis, this Court should grant review. *See* Sup. Ct. R. 10(a) & (c).

#### **A. The Proper Application of the Categorical Analysis Raises Important Federal Questions, Because It Has Ramifications in Multiple Areas of Federal Law Where National Uniformity Is at a Premium**

The correct operation of the *Taylor* analysis is indisputably an important question of federal law. Federal law uses prior convictions for such purposes as qualifying for recidivism schemes (e.g., 18 U.S.C. § 924(e) (felon in possession of firearm) or other sentencing enhancements (e.g., U.S.S.G. § 4B1.1 (career offender)) and as the basis for removal for conviction of an aggravated felony (e.g., 8 U.S.C. §§ 1101(a)(43) & 1227(a)(2)(A)(III)). The effects of qualifying convictions can be very severe: a defendant’s statutory maximum will increase to 20 years under 8 U.S.C. § 1326(b)(2) and his Guideline sentence enhanced by 16 levels under § 2L1.2(b)(1)(A); deportation for an aggravated felony results in loss of nearly all forms of relief and raises a lengthy bar against re-entry (*see, e.g.* 8 C.F.R. § 212.2(a)).

The definition of predicate offenses affecting federal sentencing or immigration status is a matter of *federal law*. See *Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010) (“The meaning of ‘physical force’ in § 924(e)(2)(B)(i) is a question of federal law, not state law. And in answering that question we are not bound by a state court’s interpretation of a similar—or even identical—state statute.”). The need for national uniformity in defining predicate convictions derives from *Taylor*, where the Court considered the predicate offense ‘burglary’ for purposes of enhancement under 18 U.S.C. § 924(e). Rejecting proposals to defer to the various state law definitions, the Court emphasized the need for national uniformity in applying the federal recidivist provisions.

Nor is there any indication that Congress ever abandoned its general approach, in designating predicate offenses, of using uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders, regardless of technical definitions and labels under state law.

*Taylor*, 495 U.S. at 590. The Court expressed particular concern to avoid keying the federal, generic definition to the vagaries of individual state labels and definitions. See *id.* at 591-92 (citing *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119-120 (1983) (absent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law, “because the application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control”); and *United States v. Turley*, 352 U.S. 407, 411 (1957) (“[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law”)).

The need for uniformity extends to the framework for analyzing prior convictions to determine their qualification for use under federal law—the so-called categorical analysis. In

*Taylor*, the Court held that in order to determine whether a state conviction qualifies for use as a predicate conviction, courts must look only to the elements of the prior conviction and compare them against the elements of the generic, federal offense. *See* 495 U.S. at 602. If the elements of the state offense are the same or narrower than the generic offense, a categorical match results; if the state offense is defined more broadly, then the court may “go beyond the mere fact of conviction **in a narrow range of cases** where a jury was actually required to find all the elements of [the] generic” offense. *Id.* (emphasis added). .

In focusing on elements and limiting the factual inquiry at the second stage, *Taylor* approved caselaw discussion of the drawbacks to a non-categorical, fact-based approach. *See id.* at 600-01. In addition to statutory language and historical treatment by Congress, the Court noted the “daunting” “practical difficulties and potential unfairness of a factual approach.” *Id.* at 601. Among these difficulties was the scenario where “the defendant pleaded guilty,” because “there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary.” *Id.* at 601-02.

Thus, to avoid the unfairness and impracticality of virtual mini-trials on the facts of prior convictions, the element-based, second-stage inquiry “allowed only a **restricted look** beyond the record of conviction under a nongeneric statute.” *Shepard*, 544 U.S. at 23 (emphasis added).

The Court’s jurisprudence on the second-stage inquiry stresses its limited and narrow nature, being a specific exception to the otherwise-applied, strict, categorical analysis focusing in the abstract on the elements of the state and generic offenses. The second stage is reached only as needed when the issue is unresolvable by a stage-one inquiry. In particular, the Court, in its

subsequent discussion of the second-stage analysis has repeatedly acknowledged that divisible statutes are just such instances where it is necessary to determine which offense the defendant was actually convicted of. Thus, the Court has cited the instance of a divisible statute as a case where the modified categorical analysis would be appropriate.

The Court further noted that a “few States’ burglary statutes” “define burglary more broadly” to include both a (generically defined) listed crime and also one or more nonlisted crimes. [*Taylor*, 495 U.S.] at 599. For example, Massachusetts defines “burglary” as including not only breaking into “ ‘a building’ ” but also breaking into a “vehicle” (which falls outside the generic definition of “burglary,” for a car is not a “ ‘building or structure’ ”). See *Shepard v. United States*, 544 U.S. 13, 16, 17 (2005); see also *Taylor*, 495 U.S., at 599 (discussing Missouri burglary statutes). **In such cases** the Court’s “categorical approach” permits the sentencing court “to go beyond the mere fact of conviction” in order to determine whether the earlier “jury was actually required to find all the elements of generic burglary.” *Id.* at 602.

*Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186-87 (2007) (emphasis added); see also *Johnson*, 130 S. Ct. at 1273 (describing the modified categorical analysis as applying “[w]hen the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not . . . to determine which crimes, some of which require violent force and some of which do not . . . to determine which statutory phrase was the basis for the conviction.”); *Nijhawan v. Holder*, 129 S. Ct. 2294, 2303 (2009) (characterizing the Court’s case law as developing the modified categorical approach to “determin[e] which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction.”).

**B. Consistent with *Taylor* and *Shepard*, Most Circuits Have Limited the Application of the Modified Categorical Inquiry to Divisible Statutes, While the Ninth Has Held the Contrary, Creating a Disunifying Split of Authority**

In keeping with *Taylor*’s and *Shepard*’s “limited” and “narrow” circumstances in which



Court's will resort to the second stage of the categorical analysis, most circuit courts that have discussed the conditions in which judges will proceed to a modified categorical analysis restrict its application to statutes that are divisible, because they encompass more than one offense, and only some of those offenses fall under the generic, federal offense.

Courts of Appeals have for some time treated the requirement of divisibility as a central criterion for proceeding beyond the first-stage categorical analysis. For example, in *James v. Mukasey*, 522 F.3d 250, 254 (2d Cir. 2008), the Circuit's *Taylor* protocol was described as follows:

We have adopted a "categorical approach" to decide whether a crime of conviction fits within the definition of aggravated felony in § 1101(a)(43)(A). "Under this approach ... 'the singular circumstances of an individual petitioner's crimes should not be considered, and only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant [.]' " **We have, however, modified this approach in one important respect:** When "a criminal statute encompasses diverse classes of criminal acts—some of which would categorically be grounds for removal and others of which would not—we have held that [the] statute [ ] can be considered 'divisible' "; the agency may then "refer[ ] to the record of conviction for the limited purpose of determining whether the alien's conviction was under the branch of the statute that permits removal."

(citations omitted; emphasis added; brackets by *James*).

Some circuit courts describe the requirement of a divisible statute as a given for going beyond stage one, *See, e.g., Gor*, 607 F.3d at 192 ("Under that approach, courts look at the 'elements and the nature of the offense of conviction, rather than to the particular facts relating to the petitioner's crime.' " Where the statute punishes diverse categories of criminal acts, some of which would subject an alien to removal and some of which would not, courts and the agency apply the so-called "modified categorical approach" to analyzing an alien's conduct." ) (citations omitted); *Nijhawan*, 523 F.3d at 393 ("Cases in which a court has recourse to the modified categorical approach generally involve 'divisible' statutes . . ."). Similarly, some courts, while

recognizing a divisible statute as the trigger to proceed to stage two, describe it as permissive for the fact-finder to then do so. *See, e.g., Jaggernauth v. Attorney General*, 432 F.3d 1346, 1355 (11<sup>th</sup> Cir. 2005).

However, others described it in more exclusive and mandatory terms.

The Government also urges us to apply the “modified categorical approach,” but we do not agree with it that the Illinois involuntary manslaughter statute is one to which the modified categorical approach applies. As we explained earlier, *James v. United States*, 550 U.S. 192 (2007)], *Taylor*, and *Shepard* permit a court to go beyond the statutory definition of the crime to consult judicial records (charging documents, plea colloquy, etc.) **only where the statute defining the crime is divisible**, which is to say where the statute creates several crimes or a single crime with several modes of commission. By “modes of commission” we mean modes of conduct identified somehow in the statute. The Illinois involuntary manslaughter statute is not divisible in this way, and we have no occasion to consult the record further in order to resolve Woods’s appeal.

*Woods*, 576 F.3d at 411 (emphasis added); *see also United States v. Zuniga-Soto*, 527 F.3d 1110, 1113 (10<sup>th</sup> Cir. 2008) (“[A] court may consider certain judicial records **only for the purpose** of determining which part of a divisible statute was charged against a defendant and, therefore, which part of the statute to examine on its face.”) (emphasis added); *United States v. Howell*, 531 F.3d 621, 624 (8<sup>th</sup> Cir. 2008) (“The charging papers may be reviewed **only to determine** under which portion of the assault statute [Howell] was convicted.”) (emphasis added).

This requirement of divisibility reflects the properly circumspect attitude toward proceeding beyond the stage-one *Taylor* analysis only in limited circumstances. As the Fifth Circuit put it in *Gonzalez-Terrazas*,

However, the Government has not demonstrated that this case falls within that “narrow range of cases” in which a district court may look beyond the elements of an offense to classify that offense for sentence enhancement purposes. . . . However, in a “narrow range of cases” the district court may go beyond the elements of the offense to make this determination. Specifically, “if the statute of conviction contains a series of disjunctive elements, this court may look to the indictment and, if necessary, the jury instructions, for the limited purpose of determining which of a



series of disjunctive elements a defendant's conviction satisfies." [¶] . . . [T]his court noted that we use the " 'modified categorical approach' **only to determine** of which subsection of a statute a defendant was convicted." Regarding the California burglary offense at issue in this case, the court noted that "[California Penal Code] § 459 has no subsection requiring 'unlawful entry.' " In this way, the court . . . recognized that the modified categorical approach, as applied by this circuit, does not apply to the "entry" element of California Penal Code § 459.

529 F.3d at 297-98 (citations omitted; emphasis added).

In the Fifth, Seventh, Eighth, and Tenth Circuits, at least, resort to the modified categorical approach is limited to cases where the state statute is divisible, and the second-stage analysis is employed solely to resolve the ambiguity of which offense the conviction stands for. The Second, Third, Sixth, and Eleventh Circuits, while not describing the basis for proceeding to the second stage in such strict terms, nonetheless identify divisibility as a central justification for going beyond *Taylor*'s first stage. Even the Ninth Circuit has acknowledged divisibility as a factor for going beyond the strict categorical analysis. See *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9<sup>th</sup> Cir. 2008), at 1160 (stating stage two is "appropriate" when the statute is divisible). The Fourth Circuit, like the Ninth, has acknowledged that divisibility is at least an occasion for employing the modified categorical approach. See *Rivas v. Mukasey*, 257 F. App'x 639, 641 (4<sup>th</sup> Cir. 2007) (citing *Duenas-Alvarez*).

Eight circuits view divisibility of the state statute as a central criterion for proceeding beyond the strict, categorical analysis to the limited exception at the second stage. Half of those circuits treat divisibility as a *sine qua non* for deviating from the basic categorical approach. Here, the Ninth Circuit departed from this overwhelming legal trend by treating Mr. Descamp's case as falling into the "narrow range of cases" where the second stage applies, even though the statute at issue is manifestly indivisible as to the missing element. Had Mr. Descamp's case been decided in the Fifth Circuit, the result would have been identical to that in *Gonzalez-Terrazas*,

where the court refused to sanction a modified categorical inquiry on an indivisible (California) statute. But because Mr. Descamps's appeal was heard by a panel in the Ninth Circuit, where the divisibility criterion is not recognized, his appeal was decided the other way.

This is the very essence of an anomalous application of the categorical approach in *Taylor*, threatening national uniformity of the law of categorical analysis and in conflict with the overwhelming trend of circuit case law. Because the decision here conflicts with the law of multiple circuits and with this Court's categorical-analysis jurisprudence, review is warranted. See Sup. Ct. R. 10(a) & (c).

**VI. Enhancement Under the ACCA is Unwarranted Because the Judicially Noticeable Facts Do Not Demonstrate That the Defendant Was Convicted of the Generic Crime of Burglary. Additionally, the Court Should Reverse on the Basis of a Lack of Indictment and Trial on the Issue of Application of ACCA**

California penal code Sec. 459 is far too sweeping to satisfy the *Taylor* definition of generic burglary. The statute provided, in pertinent part:

"Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises."

As set forth in *Taylor*, the documentation must unequivocally establish that the defendant was convicted of the generic crime of burglary by showing (1) the unlawful and unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime. *Id.* at 598.

A review of the record provided in this matter does not unequivocally establish that defendant was convicted of the generic crime of burglary. The Information filed by the District Attorney accused the defendant of "willfully, unlawfully and feloniously entering a building, with intent to commit a theft therein". However, at the plea, there was no acknowledgment of these facts, with the only "admission" by the prosecutor that "in substance" there was a breaking and entering of a grocery store. Thus, although there is evidence to support an unlawful entry of a building, there was nothing in the record to establish that the entry in the building occurred with the requisite "generic" intent. Accordingly, since the "generic elements" of burglary specified by the Supreme Court cannot be met, it is submitted that this criminal conviction cannot be used as a predicate offense to support the ACCA enhancement.

All of the documents use the term "Centromart", however, there are no additional facts contained in any of the documents that shows that the "building" under consideration was a generic one under *Taylor*. There is still the possibility that the "building" that is being discussed could have been based on the definition contained in Sect. 459, and could have been a "...tent...".

The fact that a business name is provided in the Information/Complaint does not disprove that the burglary could have involved a tent, hence, there is insufficient proof that the charge necessarily involved a generic building. Furthermore, the transcript does not provide enough information provide as to what was meant when the term "building" was being used. The definition is expansive by its terms.

In the transcript (ER 46) the only pertinent part provided, as follows:

"...The Court: Is there a factual basis for the entry of the plea of guilty, Mr. Tautman?

Mr. Tautman: There is a factual basis.

The Court: Do you concur in that, Mr. DeSilva?

Mr. De Silva: Yes, your Honor.

The Court: In substance, what does this involve?

Mr. De Silva: This involves the breaking and entering of a grocery Store.

The Court: On North California Street?

Mr. De Silva: Yes, Your Honor....."

The "grocery store" could have involved a tent since many grocery stores do have tent sales and often use tents to store items.

In *Shepard* the Court went further in Part III of its opinion to point out that accepting the government's position would raise Sixth Amendment concerns. The Court noted that even though there has been a prior conviction in state court, the state conviction may not clearly indicate those facts on which the prior conviction necessarily rested. At that point, a federal sentencing judge may make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea. The Court notes that this:

"...dispute raises the concern underlying Jones and Appendi: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence. While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to Jones v. United States, 526 U.S. 227 (1999) and Appendi v. New Jersey, 530 U.S. 224 (2000) to say that Almandez-Torres v. United States, 523 U.S. 224 (1998) clearly authorizes a judge to resolve the dispute."

Id. at 125 S. Ct. 1262.

It appears that the Court is avoiding making a constitutional decision by holding that the judge can make a limited enquiry as to whether there is sufficient proof of the prior offense qualifying under the ACCA using the limited documents that were mentioned. In the instant case, the government will no doubt urge the Court to make a factual decision that when the Court in California was using the word "building", it meant a building as required in *Taylor*. If the Court does delve into this fact finding area, then the defendant contends that he is entitled to have a jury make this determination, with proof beyond a reasonable doubt under *Apprendi* and *Blakely v. Washington*, 542 U.S. 296 (2004). In fact, the failure of the government to indict the defendant under the Armed Career Criminal Act and prove facts to a jury should preclude the government from pursuing ACCA in this matter. In the watershed ruling in *Apprendi*, the Supreme Court established the constitutional norm that the Fifth and Sixth Amendments require all factors that increase the statutory maximum to be proved to a jury beyond a reasonable doubt. The *Apprendi* Court recognized a "narrow exception" to this rule for undisputed prior convictions under the immigration statutes in *Almendarez-Torres*. The Court reinforced the *Apprendi* rule by applying it to guideline enhancements in *Blakely*, *Supra.*, and to the federal right to indictment in *United States v. Cotton*, 535 U.S. 224 (2002). Under the statute, or alternatively, the Constitution, Mr. Descamps contends that he is entitled to relief based on the failure to indict and to prove to a jury the facts that result in a sentence in excess of the statutory maximum under Section 922(g). In its opinion in *Apprendi*, the Court quoted the *Jones* Court's admonition that "the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment [require that] any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a

jury, and proven beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6).

In order to avoid the constitutional problems, this Court should simply hold that the government has failed to establish that the California burglary conviction count under ACCA due to the lack of factual proof that these involved generic burglary under *Taylor*.

In *Shepard* the Court stated at page 1262 and 1263:

“...The state statute requires no finding of generic burglary, and without a charging document that narrows the charge to generic limits, the only certainty of a generic finding lies in jury instructions, or bench trial findings and rulings, or (in a pleaded case) in the defendant's own admissions or accepted findings of fact confirming the factual basis for a valid plea. In this particular pleaded case, the record is silent on the generic element, there being no plea agreement or recorded colloquy in which Shepard admitted the generic fact.

Instead, the sentencing judge considering the ACCA enhancement would (on the Government's view) make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea, and the dispute raises the concern underlying *Jones* and *Apprendi*: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence. While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading \*1263 statutes to avoid serious risks of unconstitutionality, see *Jones, supra*, at 239, 119 S.Ct. 1215, therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as *Taylor* constrained judicial findings about the generic implication of a jury's verdict. [FN5]”

## CONCLUSION

This appeal raises important questions of the proper scope of the *Taylor* analysis, a procedure having wide-spread application and where national uniformity is at a premium. The petition for a writ of certiorari should be granted to resolve the circuit split on the application of the modified categorical approach to indivisible statutes, including those statutes with a missing



element of the generic federally defined crime. The Court should reverse the application of the ruling of the Ninth Circuit in *United States v. Aguila-Montes De Oca*, apply the reversal ruling to the present case on appeal, and remand with instructions that the California Burglary Statute may not be used to enhance the Defendant/Petitioner's sentence under ACCA, thus Defendant/Petitioner would not be subject to sentencing under ACCA. Alternatively, this Court should grant this Petition and overrule the ruling in Almandez-Torres v. United States, 523 U.S. 224 (1998) and pursuant to the requirements of Apprendi v. New Jersey, 530 U.S. 224 (2000), require an Indictment and proof beyond a reasonable doubt before a jury to justify application of the Armed Career Criminal Act.

Respectfully submitted this \_\_\_\_ day of March, 2012,

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# **OPPOSITION BRIEF**



IN THE SUPREME COURT OF THE UNITED STATES

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MATTHEW ROBERT DESCAMPS, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the courts below correctly applied a modified categorical approach in concluding that petitioner's prior California conviction for burglary was a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. 924(e).

2. Whether this Court should overrule Almendarez-Torres v. United States, 523 U.S. 224 (1998).

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2012. The petition for a writ of certiorari was filed on March 19, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Washington, petitioner was convicted of

being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), to 262 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1-5.

1. On March 25, 2005, the Stevens County, Washington, Sheriff's Dispatch received a 911 call reporting that petitioner had fired a handgun at another person. Presentence Investigation Report (PSR) ¶ 13. Police responded and saw petitioner driving from the scene. After a high-speed chase, petitioner ran from his vehicle into a bus that was being used as a residence, carrying a black coat. Petitioner emerged from the bus about ten seconds later, without the coat. Petitioner was arrested. PSR ¶ 14. A search of the bus found, inside the coat petitioner had carried into the bus, a loaded .32 caliber revolver loaded with one fired casing and four live bullets. PSR ¶ 15.

2. A grand jury charged petitioner with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 924(e). After a jury trial, petitioner was convicted of that offense.

The PSR recommended that petitioner be sentenced under the ACCA, which, as relevant here, provides for an increased sentence for a person who violates 18 U.S.C. 922(g) and has three previous convictions "for a violent felony," 18 U.S.C. 924(e)(1), defined as

"any crime punishable by imprisonment for a term exceeding one year \* \* \* that -- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). The PSR found that provision to apply because petitioner had at least three prior felony convictions that qualified as violent felonies, including California convictions for robbery and second degree burglary and a Washington conviction for felony harassment. PSR ¶¶ 52, 66, 71, 103.

The parties agreed that petitioner's robbery conviction qualified as a violent felony under ACCA, but petitioner challenged whether his burglary and felony-harassment convictions qualified as ACCA predicate offenses. See Pet. App. 3. The definition of "violent felony" specifically includes "burglary." 18 U.S.C. 924(e)(2)(B)(ii). In Taylor v. United States, 495 U.S. 575 (1990), this Court held "that a person has been convicted of burglary for purposes of a [Section] 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Id. at 599. If a state statute contains both this generic burglary offense and another offense that does not meet these elements, such

as where a burglary statute includes entry into places other than buildings like "automobiles and vending machines," then the court must employ a modified categorical approach to determine whether a defendant was convicted of a generic burglary offense. Id. at 599-602. In making this determination, a court may look to the charging documents, the jury instructions, the terms of the plea agreement, the transcript of the plea colloquy confirming the factual basis for the plea, or other comparable judicial records. See Shepard v. United States, 544 U.S. 13, 26 (2005); Taylor, 495 U.S. at 602.

The California statute under which petitioner had been convicted provides that "[e]very person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, [or] vessel \* \* \* with intent to commit grand or petit larceny or any felony is guilty of burglary." Cal. Penal Code § 459 (West 1978); see Pet. App. 3. The district court found that petitioner's prior conviction for burglary under this statute satisfied the ACCA definition of "violent felony" as interpreted by Taylor. Id. at 7-9. The court noted that the criminal information to which petitioner pleaded guilty charged that he unlawfully entered "CentroMart" with "the intent to commit theft therein." Id. at 9; see id. at 30 (criminal information). The court further relied on the transcript of the change-of-plea hearing, during which the prosecutor stated, without

objection by petitioner, that the factual basis for the offense "involve[d] the breaking and entering of a grocery store." Id. at 9 & n. 1; see id. at 40 (plea hearing transcript).

The district court also found that petitioner's prior offense of felony harassment qualified as a violent felony. Pet. App. 11-12. The criminal information to which petitioner pleaded guilty in that case charged petitioner with threatening to kill a judge. Id. at 12. The court found that such an offense involves the "threatened use of physical force against the person of another" and therefore was also a "violent felony." Ibid. (citing 18 U.S.C. 924(e)(2)(B)(i)).

The district court found that petitioner's advisory sentencing range, enhanced because of the application of the ACCA, was 262 to 327 months of imprisonment. Pet. App. 12-14. The court sentenced petitioner to 262 months of imprisonment to be followed by five years of supervised release. Judgment 1-2.

3. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1-5. As relevant here, applying this Court's decision in Almendarez-Torres v. United States, 523 U.S. 224, 226-227 (1998), the court rejected petitioner's contention that the fact of a prior conviction that is used to increase the maximum term of imprisonment to which the defendant is subject must be charged in the indictment and admitted by the



defendant or submitted to a jury for a finding beyond a reasonable doubt. Pet. App. 2-3.

The court of appeals also rejected petitioner's contention that his California burglary conviction did not qualify as a violent felony. Pet. App. 3-4. Recognizing that the California statute at issue encompassed conduct that would not qualify as a "burglary" as defined by Taylor, the court applied the modified categorical approach of Shepard. Ibid. It found that the change-of-plea transcript in the case clarified that the CentroMart identified in the criminal information that was entered by petitioner with the intent to commit theft was a grocery store and therefore was a qualifying building under Taylor. Id. at 4. The court rejected "as fanciful" petitioner's argument that it might have been a "tent," not a building, and therefore his crime might have been outside Taylor's definition of burglary. Ibid. The court also explained that petitioner's plea colloquy "establishe[d] that [petitioner] [entered the store] in an unlawful way (by 'breaking and entering') in the generic sense." Ibid.

#### ARGUMENT

Petitioner contends (Pet. 8-13) that the court of appeals erred in applying the modified categorical approach to determine whether his prior offense was "burglary" within the ACCA's definition of "violent felony" because the California burglary statute does not consist of discrete subsections, some of which

qualify as "burglary" and some of which do not. He also states (Pet. 13-21) that the court of appeals' application of the modified categorical approach here implicates a division of authority among the courts of appeals. The Ninth Circuit correctly applied a modified categorical approach here. Although lower courts have taken different approaches to when a modified categorical approach may be used, that disagreement predates the en banc Ninth Circuit's recent comprehensive decision on the issue in United States v. Aguila-Montes de Oca, 655 F.3d 915 (2011), and few other courts have devoted sustained attention to the question. This Court's intervention would be premature at this time. The Court has very recently denied several petitions raising identical or similar questions in the wake of Aguila-Montes, and there is no reason for a different result here. See Randolph v. United States, No. 11-8135 (May 29, 2012); Fischer v. United States, 132 S. Ct. 1857 (2012) (No. 11-662); Baranda-Cuevas v. United States, 132 S. Ct. 755 (2011) (No. 10-11004); Alvarez-Cordova v. United States, 132 S. Ct. 574 (2011) (No. 10-10777). As for petitioner's other contentions, his argument (Pet. 21-23) that the records of his prior burglary conviction in particular did not sufficiently show that he unlawfully entered a building with the intent to commit a felony is factbound, and this Court has repeatedly denied petitions contending, as petitioner does (Pet. 24-25), that Almendarez-Torres

v. United States, 523 U.S. 224, 226-227 (1998), should be overruled. Further review is not warranted.

1. a. Under the ACCA a "crime punishable by imprisonment for a term exceeding one year" is a "violent felony" if the offense "is burglary." See 18 U.S.C. 924(e)(2)(B)(ii). In Taylor v. United States, 495 U.S. 575 (1990), this Court held that a crime is burglary for purposes of the ACCA if it has the "basic elements" of the generic crime of burglary, which are the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Id. at 599. As this Court explained in Shepard v. United States, 544 U.S. 13 (2005), the statute "makes burglary a violent felony only if committed in a building or enclosed space \* \* \* , not in a boat or motor vehicle." Id. at 15-16. When a defendant is convicted of "burglary" in a State with a burglary statute (like the California statute at issue here) that embraces both this generic burglary offense and another offense that does not meet these elements, then a court must employ a modified categorical approach to determine whether the defendant was convicted of a generic burglary offense. See Taylor, 495 U.S. at 599-602. In making this determination, a court may look to the charging documents, jury instructions, the terms of a plea agreement, the transcript of a plea colloquy confirming the factual basis for the plea, or other comparable judicial records. See Shepard, 544 U.S. at 26; Taylor, 495 U.S. at

602. The government has the burden of proving the existence of a qualifying prior conviction by a preponderance of the evidence. See United States v. O'Brien, 130 S. Ct. 2169, 2174 (2010); Almendarez-Torres, 523 U.S. at 228, 230. The court of appeals applied the modified categorical approach to determine whether petitioner's California burglary conviction was for "burglary" under the ACCA, as defined in Taylor.

b. Petitioner contends (Pet. 8-13) that the decision below is inconsistent with this Court's precedent, which in petitioner's view limits application of the modified categorical approach to so-called "divisible" statutes, which are statutes that expressly delineate alternative elements or combinations of elements that suffice to establish guilt of the offense, some of which constitute a violent felony and some of which do not.

This Court's decisions clearly permit use of a modified categorical approach in the context of divisible statutes. See, e.g., Johnson, 130 S. Ct. at 1273 (noting that the Court's decisions "permit[]" use of a modified categorical approach when a defendant has been convicted under a law that "contains statutory phrases that cover several different generic crimes \* \* \* to determine which statutory phrase was the basis for the conviction"). Petitioner contends (Pet. 10-12, 17) that isolated statements in Johnson, Nijhawan v. Holder, 129 S. Ct. 2294 (2009), and Gonzalez v. Duenas-Alvarez, 549 U.S. 183 (2007), amount to

holdings that the modified categorical approach cannot be used outside the context of a divisible statute. But the statements to which petitioner refers are merely descriptive of this Court's approach to statutes it has actually analyzed; the Court has never limited the modified categorical approach to divisible statutes. See Aguila-Montes, 655 F.3d at 924, 931.

In Taylor itself, this Court illustrated the use of the modified categorical approach with an example of a state statute that defined the offense of burglary more broadly than the elements of the generic, federal definition. 495 U.S. at 602. The Court explained that "if the indictment or information and jury instructions show that the defendant was charged only with" the elements of the generic, federal crime, and "that the jury necessarily had to find [those elements] to convict," then the offense qualifies as generic "burglary" within the meaning of federal law. Ibid. Such an approach is not "fact-based" in the way petitioner contends (Pet. 10), but instead rests on judicial records establishing the elements charged and admitted to by the defendant or found by a jury. Accordingly, the courts below appropriately consulted the judicial records they did to determine whether petitioner pleaded guilty to generic burglary. See Aguila-Montes, 655 F.3d at 936-937.

c. As petitioner correctly notes (Pet. 14-21), the courts of appeals have not taken consistent approaches to question whether

the modified categorical approach is limited to divisible statutes. See Aguila-Montes, 655 F.3d at 931 (describing the state of the law in the courts of appeals as "a bit of a jumble"). Few courts, however, have devoted sustained attention to the question, and no developed conflict warrants this Court's intervention at this time.

As an initial matter, only a few courts appear to have limited the modified categorical approach to the class of statutes that petitioner labels as divisible. See United States v. Woods, 576 F.3d 400, 406-407 (7th Cir. 2009); United States v. Gonzalez-Terrazas, 529 F.3d 293, 297-298 (5th Cir. 2008). But see Aguila-Montes, 655 F.3d at 932 (explaining that the "Seventh Circuit has recently refined its course" and that it is now "less clear that the court has converged on a divisible-statutes-only rule") (citing United States v. Fife, 624 F.3d 441, 644 (7th Cir. 2010), cert. denied, 131 S. Ct. 1536 (2011)). The Eighth Circuit has stated that the modified categorical approach should be applied "only to determine which part of the statute the defendant violated," United States v. Boaz, 558 F.3d 800, 808 (2009) (quoting United States v. Howell, 531 F.3d 621, 622-623 (8th Cir. 2008)), but it has not consistently followed that prescription, see, e.g., United States v. Medina-Valencia, 538 F.3d 831, 835 (8th Cir.) (using fact admitted in plea agreement to conclude that the defendant's particular violation of Tex. Penal Code Ann.

§ 21.11(a)(1) (Vernon 1990) was "sexual abuse of a minor" under the Sentencing Guidelines), cert. denied, 555 U.S. 1079 (2008).

Other circuits have characterized the modified categorical approach as generally appropriate when a statute's language encompasses different combinations of elements, only some of which would qualify as the generic crime defined in a federal statute or the Sentencing Guidelines. See, e.g., Gor v. Holder, 607 F.3d 180, 192 (6th Cir. 2010) (dicta), cert. denied, 131 S. Ct. 3058 (2011); Nijhawan v. Attorney Gen., 523 F.3d 387, 393 (3d Cir. 2008) (dicta noting that cases applying the modified categorical approach "generally involve" divisible statutes), aff'd, 557 U.S. 29 (2009); James v. Mukasey, 522 F.3d 250, 254, 256 (2d Cir. 2008); see also, e.g., Accardo v. United States Att'y Gen., 634 F.3d 1333, 1336 (11th Cir. 2011); United States v. Soto-Sanchez, 623 F.3d 317, 320 (6th Cir. 2010). But those courts have drawn their general descriptions from previous decisions explaining the modified categorical approach in general terms and have not provided reasons that would support petitioner's proposed limitation of the categorical approach to divisible statutes.

Moreover, those courts that have suggested a divisibility limitation have not articulated a consistent definition of such a limitation. Some courts have suggested that the formal structure of the statute may determine whether it is susceptible to the modified categorical approach, see United States v. Brown, 631 F.3d



573, 577-578 (1st Cir. 2011) (additionally noting that nothing suggests that "such a subdivision" has been imported by "judicial construction"); Lanferman v. BIA, 576 F.3d 84, 90 (2d Cir. 2009) (adding that "the exact parameters of the divisibility inquiry have not been determined" by the Second Circuit), while others have held that "the presence or absence of numbered subdivisions" does not control, so long as the statute "creates multiple offense categories" or "multiple modes of commission," Fife, 624 F.3d at 446; see Oouch v. DHS, 633 F.3d 119, 122 & n.4 (2d Cir. 2011) (noting that Second Circuit has "discussed three potential approaches" for deciding whether a statute is divisible, "without selecting one").

If the different standards articulated by the courts of appeals persist and have practical significance, this Court's review may be warranted in the future in an appropriate case. But such review would be premature at this time. Significantly, the court of appeals decisions to which petitioner points were decided before the Ninth Circuit's en banc decision in Aguila-Montes (issued Aug. 11, 2011). In Aguila-Montes, the Ninth Circuit overruled its prior case law precluding application of the modified categorical approach "[w]hen the crime of conviction is missing an element of the generic crime altogether." 655 F.3d at 917 (quoting Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1073 (9th Cir. 2007)). After reviewing in detail this Court's precedents and surveying

case law from other circuits, see id. at 931-935, the court held that, when the statute at issue "is categorically broader than the generic offense," courts may apply a modified categorical approach by consulting "judicially noticeable documents" to determine "(1) what facts the conviction necessarily rested on (that is, what facts the trier of fact was actually required to find); and (2) whether these facts satisfy the elements of the generic offense," id. at 940. See also id. at 927 (noting that divisible statutes, which explicitly list alternative bases for conviction, are not "meaningfully different" from non-divisible statutes; a statute that proscribes "harmful contact" is "indistinct from a list of all the possible ways an individual can commit harmful contact ('harmful contact with a vehicle, harmful contact with a gun, harmful contact with an axe, harmful contact with a utensil' and so on.)").

Aguila-Montes clarifies the proper application of the modified categorical approach and is likely to foster further development of the law. For example, the Tenth Circuit has since agreed with the Ninth Circuit's approach in a case, like petitioner's, that implicated a generic offense, even though earlier statements from the Tenth Circuit (on which petitioner relies, see Pet. 19) suggest a different approach in cases not implicating a generic offense. Compare United States v. Venzor-Granillo, 668 F.3d 1224, 1231 (10th Cir. 2012) (following Aguila-Montes), with United States v. Zuniga-

Soto, 527 F.3d 1110, 1118, 1122 (10th Cir. 2008) (stating that a "court may consult judicial records only for the purpose of determining which portion of a statute was charged against the defendant" to decide whether the defendant "has been convicted of a felony 'that has as an element the use . . . of physical force,'" U.S.S.G. § 2L1.2 comment. n.1(B)(iii), though ultimately consulting those records and finding "no evidence that [the defendant] was convicted under a part of the [state law] that [qualified as a crime of violence]"). Further consideration in the courts of appeals is therefore appropriate.

d. Petitioner also asks (Pet. 21-23) this Court to review the factbound question whether the transcript of the change-of-plea hearing permitted the district court to conclude by a preponderance of the evidence that petitioner's prior California conviction was for entry of a building to commit theft, rather than, for example, entry of a tent. Further review of that case-specific question is unwarranted. See Sup. Ct. R. 10; Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 841 (1996) (explaining that this Court ordinarily does not review factual findings on which the two lower courts agree). The criminal information to which petitioner pleaded guilty charged that he unlawfully entered "CentroMart" with "the intent to commit theft therein." Pet. App. 9; id. at 30 (criminal information). The district court relied on the transcript of the change-of-plea hearing, during which the prosecutor stated, without

objection by petitioner, that the offense "involve[d] the breaking and entering of a grocery store." Id. at 9 & n.1 (brackets in original); id. at 40 (plea hearing transcript). Petitioner does not contest that both those sources of information were permissibly consulted under the modified categorical approach. They provided sufficient evidence to support the district court's conclusion that petitioner was convicted of unlawfully entering a building to commit theft, and thus that he committed burglary within the meaning of the ACCA definition of violent felony.

2. Petitioner also contends (Pet. 24-26) that this Court should overrule Almendarez-Torres, supra, which held that the fact of a prior conviction used to increase the maximum term of imprisonment that may be imposed on a defendant may be found by the sentencing judge by a preponderance of the evidence and need not be alleged in the indictment or proved to a jury beyond a reasonable doubt. There is no warrant for reconsidering that rule. In keeping with Almendarez-Torres, this Court held in Apprendi v. New Jersey, 530 U.S. 466 (2000), that the Sixth Amendment requires any fact "[o]ther than the fact of a prior conviction" to be submitted to a jury, and proved beyond a reasonable doubt (or admitted by the defendant), when it increases the penalty for a crime beyond the prescribed statutory maximum. Id. at 490. This Court has since repeatedly affirmed that the Sixth Amendment rule announced in Apprendi applies only to penalty-enhancing facts "other than the

fact of a prior conviction.” Southern Union Co. v. United States, No. 11-94 (June 21, 2012), slip op. 1; see Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2581 n.3 (2010); James v. United States, 550 U.S. 192, 214 n.8 (2007); Cunningham v. California, 549 U.S. 270, 274-275 (2007); United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 301-302 (2004); Dretke v. Haley, 541 U.S. 386, 395-396 (2004).

This Court has repeatedly denied petitions for writs of certiorari urging that Almendarez-Torres be overruled. See, e.g., Rangel-Reyes v. United States, 547 U.S. 1200, 1201-1202 (2006) (Stevens, J., respecting the denial of certiorari) (“The doctrine of stare decisis provides a sufficient basis for the denial of certiorari in these cases.”) (Nos. 05- 10706, 05-10743, 05-10815); Washington v. United States, 131 S. Ct. 137 (2010) (No. 09-11080); Zavala-Alonso v. United States, 131 S. Ct. 186 (2010) (No. 09-11372); Stanley v. United States, 555 U.S. 1104 (2009) (No. 08-6271); Weiland v. United States, 555 U.S. 1104 (2009) (No. 08-6158); Lopez-Velasquez v. United States, 555 U.S. 1050 (2008) (No. 08-5514); Polino-Mercedes v. United States, 555 U.S. 997 (2008) (No. 08-5040); Henderson v. United States, 553 U.S. 1006 (2008) (No. 07-7837); Solis-Alvarez v. United States, 552 U.S. 1188 (2008) (No. 07- 6009). The same result is warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.  
Solicitor General

LANNY A. BREUER  
Assistant Attorney General

RICHARD A. FRIEDMAN  
Attorney

JUNE 2012

# **JOINT APPENDIX**



OCT 24 2012

IN THE  
**Supreme Court of the United States** THE CLERK

MATTHEW ROBERT DESCAMPS,

*Petitioner*

v.

UNITED STATES OF AMERICA,

*Respondent*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**JOINT APPENDIX**  
**Volume I**

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PETITION FOR CERTIORARI FILED: MAR. 19, 2012  
CERTIORARI GRANTED: AUG. 31, 2012

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**APPENDIX A — RELEVANT DOCKET ENTRIES****RELEVANT DOCKET ENTRIES FOR THE  
UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF WASHINGTON****Date Filed    #    Docket Text**

\* \* \* \* \*

05/10/05       16    INDICTMENT as to Matthew Robert Descamps count 1. (Attachments: # 1 Penalty Slip) (RF, Case Administrator) (Entered: 05/10/2005)

\* \* \* \* \*

12/19/05       96    INFORMATION TO ESTABLISH PRIOR CONVICTION by USA as to Matthew Robert Descamps (Whitaker, Stephanie) (Entered: 12/19/2005)

\* \* \* \* \*

09/13/07       352    JURY VERDICT as to Matthew Robert Descamps (1) Guilty on Count 1. (VJ, Case Administrator) (Entered: 09/13/2007)

\* \* \* \* \*

12/27/07       402    SENTENCING MEMORANDUM by Matthew Robert Descamps (Attachments: # 1 Exhibit Letter from Family) (Niesen, Jeffrey) (Entered: 12/27/2007)

\* \* \* \* \*

*Appendix A*

12/28/07      403 NOTICE of Review of Presentence Investigation Report *and Memorandum in Support of Armed Career Criminal Application* by USA as to Matthew Robert Descamps (Attachments: # 1 Attachments A1-A4 # 2 Attachments B1-B5 # 3 Attachments C1-C4 # 4 Attachments D1-D4 # 5 Attachments E1-E3) (Whitaker, Stephanie) (Entered: 12/28/2007)

\* \* \* \* \*

01/04/08      404 Minute Entry for proceedings held before Judge Fred Van Sickle: Sentencing held on 1/4/2008 for Matthew Robert Descamps (1), Count 1, Impr. 262 months; Supervised Release 5 years; SA \$100.00; Fine waived. (Reported by: Debra Clark) (CP, Courtroom Deputy) (Entered: 01/04/2008)

01/07/08      405 LODGED NOTICE OF APPEAL by Matthew Robert Descamps re 404 Sentencing, ; Filing fee \$ 455, receipt number waived. (Niesen, Jeffrey) (Entered: 01/07/2008)

01/09/08      406 FINDINGS AND CONCLUSIONS  
 \*\*\* CLERK'S ACTION REQUIRED  
 \* \* \* —denying 401 Motion as to Matthew Robert Descamps (1). Mr.

*Appendix A*

Niesen's Oral Motion to Withdraw as Counsel of Record is granted. A Magistrate Judge shall appoint an attorney to represent the defendant on appeal. Signed by Judge Fred Van Sickle. (CS, Case Administrator) Modified on 1/11/2008 added text re: atty withdrawal (VR, Case Administrator). (Entered: 01/09/2008)

01/14/08      407 JUDGMENT as to Matthew Robert Descamps (1), Count 1, Impr. 262 months; Supervised Release 5 years; SA \$100.00; Fine waived. Signed by Judge Fred Van Sickle. (CS, Case Administrator) (Entered: 01/14/2008)

\* \* \* \* \*

01/14/08      409 NOTICE OF APPEAL by Matthew Robert Descamps re 407 Judgment filed 1/14/08 Filing fee \$.00, receipt number cja. (Attachments: # 1) (VR, Case Administrator) Modified on 1/9/2012—9CCA #08-30013. (LE, Case Administrator). (Entered: 01/14/2008)

\* \* \* \* \*

03/05/08      426 REPORTER'S TRANSCRIPT: Type of proceeding: Sentencing Hearing. Proceedings held on 1/4/08 in Spokane, WA before Judge Van Sickle. Court Reporter: Debra Kinney Clark Page

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*Appendix A*

Numbers: 1-75. re 409 9CCA Notice of Appeal as to Matthew Robert Descamps. Remote electronic access is not available for transcripts. (RF, Case Administrator) (Entered: 03/05/2008)



*Appendix A***RELEVANT DOCKET ENTRIES FOR THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

| <b>Filed<br/>Date</b> | <b>#</b> | <b>Docket Text</b>                                                                                                                                                                                                                                                                                                                                                                                                                                              |
|-----------------------|----------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 01/22/08              | 1        | DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 1/15/08; setting schedule as follows: transcript shall be ordered by 2/5/08 for Matthew Robert Descamps; transcript shall be filed by 3/6/08; appellants' briefs, excerpts due by 4/15/08 for Matthew Robert Descamps; appellees' brief due 5/15/08 for USA; appellants' reply brief due by 5/29/08 for Matthew Robert Descamps. ( RT required: y) ( Sentence imp 262 mos) [08-30013] (DWL) |
| * * * * *             |          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 06/05/08              | 13       | Filed original and 15 copies of Appellant Matthew Robert Descamps (Informal: No) opening brief of 54 pages. Five copies Excerpts of record in 2 volumes. Served on 06/02/2008. (WP)                                                                                                                                                                                                                                                                             |
| * * * * *             |          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 07/23/08              | 16       | Filed original and 15 copies of Appellee (Informal: No) opening brief of 27 pages. Five copies Excerpts of record in 1 volume. Served on 07/18/2008.—[Edited 11/03/2008 by TP] (PK)                                                                                                                                                                                                                                                                             |

*Appendix A*

\* \* \* \* \*

02/23/09     30     Filed clerk order (Deputy Clerk: AF):  
The Court is of the unanimous opinion  
that the facts and legal arguments  
are adequately presented in the briefs  
and records and the decisional process  
would not be significantly aided by oral  
argument. This case shall be submitted  
on the briefs and record, without oral  
argument, on Wednesday, March 11,  
2009, in Seattle, Washington. (AF')

\* \* \* \* \*

02/23/09     31     Filed clerk order (Deputy Clerk:AF ):  
The parties shall file supplemental letter  
briefs addressing the significance of  
*United States v. Aguila-Montes De Oca*,  
No. 05-50170, \_\_\_\_ F.3d \_\_\_\_, 2009 WL  
115727 (January 20, 2009). Parties shall  
file simultaneous letter briefs on or before  
fourteen (14) days from the filed date of  
this order. The briefs shall not exceed  
ten (10) pages (double-spaced) or 2,800  
words and may be in the form of letters  
to the clerk of this court. (AF')

\* \* \* \* \*

03/09/09     38     Filed original and 15 copies of Appellant  
Matthew Robert Descamps (Informal:  
No) supplemental letter brief of 3 pages.  
Served on 03/06/2009. (PANEL) (WP)

\* \* \* \* \*

03/09/09     39     Filed (ECF) Appellee USA  
Correspondence: Letter brief re

*Appendix A*

significance of *U.S. v. Aguila-Montes De Oca*. Date of service: 03/06/2009 [6838373] (SAV)

03/11/09     40     SUBMITTED ON THE BRIEFS TO WILLIAM A. FLETCHER, RONALD M. GOULD and RICHARD C. TALLMAN (KM)

03/17/09     41     Filed order (WILLIAM A. FLETCHER, RONALD M. GOULD and RICHARD C. TALLMAN): Submission of this case is withdrawn, and submission is deferred pending the outcome of en banc activity in *United States v. Aguila-Montes De Oca*, 553 F.3d 1229 (9th Cir. 2009) and the receipt of Appellee's pro se brief, due on or before May 5, 2009, as well as the government's response, due thirty days thereafter. (AF)

\* \* \* \* \*

01/10/12     52     Filed order (WILLIAM A. FLETCHER, RONALD M. GOULD and RICHARD C. TALLMAN) This case is resubmitted as of the date of this order. [8025245] (DD)

01/10/12     53     FILED MEMORANDUM DISPOSITION (WILLIAM A. FLETCHER, RONALD M. GOULD and RICHARD C. TALLMAN) AFFIRMED. FILED AND ENTERED JUDGMENT. [8025263] (DD)

\* \* \* \* \*

**APPENDIX B — INDICTMENT OF THE UNITED  
STATES DISTRICT COURT, EASTERN DISTRICT  
OF WASHINGTON, DATED MAY 10, 2005**

James A. McDevitt  
United States Attorney  
Eastern District of Washington  
Stephanie Whitaker  
Assistant United States Attorney  
Post Office Box 1494  
Spokane, WA 99210-1494  
Telephone: (509) 353-2767

**UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF WASHINGTON**

**CR-05-0104-FVS  
INDICTMENT**

**Vio: 18 U.S.C. § 922(g)(1) Felon in Possession  
of a Firearm and Ammunition (Count 1)**

**UNITED STATES OF AMERICA,**

**Plaintiff**

**vs.**

**MATTHEW ROBERT DESCAMPS,**

**Defendant**

*Appendix B*

The Grand Jury Charges:

COUNT 1

On or about March 25, 2005, in the Eastern District of Washington, MATTHEW ROBERT DESCAMPS having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce a firearm, to wit: a U.S. Revolver Company handgun, .32 S&W caliber, serial number A34359, and ammunition, to wit: seven (7) .32 caliber automatic rounds of ammunition, headstamped "R-P" manufactured by Remington, which firearm and ammunition had theretofore been transported in interstate commerce; all in violation of 18 U.S.C. §§ 922(g) and 924.

DATED this 10 day of May, 2005.

A TRUE BILL

---

JAMES A. McDEVITT  
United States Attorney

/s/ EARL A. HICKS AUSA for  
STEPHANIE WHITAKER  
Assistant United States Attorney

/s/ JAMES A. McDEVITT  
JAMES A. McDEVITT

10a

*Appendix B*

**PENALTY SLIP**

**DEFENDANT NAME: MATTHEW ROBERT  
DESCAMPS**

**TOTAL NO. COUNTS: 1**

**VIO: 18 U.S.C. §§ 922(g) and 924 Felon in Possession  
of a Firearm and Ammunition (Count 1)**

**PENALTY: CAG not more than 10 years; and/or  
\$250,000 fine; not more than 3 years  
supervised release; and a \$100 special  
penalty assessment**

**IF THE DEFENDANT IS FOUND TO BE AN ARMED  
CAREER CRIMINAL:**

**PENALTY: CAG not less than 15 years nor more  
than life, ineligible for probation, non-  
suspendable, non-parolable; and/or  
\$250,000.00 fine; not more than 5 years  
supervised release; and a \$100.00 special  
penalty assessment**

**CASE NO. CR-05-0104-FVS**

**AUSA**

**INITIAL Eah**

**APPENDIX C — INFORMATION TO ESTABLISH  
PRIOR CONVICTION, DIST. CT. DKT. NO. 96,  
FILED ON DECEMBER 19TH, 2005**

James A. McDevitt  
United States Attorney  
Eastern District of Washington  
Stephanie Whitaker  
Assistant United States Attorney  
Post Office Box 1494  
Spokane, WA 99210-1494  
Telephone: (509) 353-2767

**UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF WASHINGTON**

**CR-05-0104-FVS  
Information to Establish Prior Convictions**

**UNITED STATES OF AMERICA,**

**Plaintiff**

**vs.**

**MATTHEW ROBERT DESCAMPS,**

**Defendant**

**The United States Attorney alleges that:**

**On or about January 23, 1977, in the Superior Court of  
the State of California, in and for the County of Orange,  
the defendant MATTHEW ROBERT DESCAMPS being**



*Appendix C*

present with counsel plead guilty to the offense of Robbery First Degree, a violent offense felony.

On or about December 4, 1978, in the Superior Court of the State of California, in and for the County of San Joaquin, the defendant MATTHEW ROBERT DESCAMPS being present with counsel plead guilty to the offense of Burglary, a violent offense felony.

On or about October 4, 1991, in the Superior Court of the State of Washington, in and for the County of Stevens, the defendant MATTHEW ROBERT DESCAMPS being present with counsel plead guilty to the offense of Assault Third Degree, a violent offense felony.

On or about November 18, 1998, in the Superior Court of the State of Washington, in and for the County of Spokane, the defendant MATTHEW ROBERT DESCAMPS being present with counsel plead guilty to the offense of Third Degree Assault, a violent offense felony.

On or about December 5, 2000, in the Superior Court of the State of Washington, in and for the County of Pend Oreille, the defendant MATTHEW ROBERT DESCAMPS being present with counsel plead guilty to the offense of Felony Harassment with Threat to Kill, a violent offense felony.

This information is being brought to increase the defendant's punishment and is brought pursuant to the provisions of 18 U.S.C. § 924(e).

*Appendix C*

DATED December 19, 2005.

James A. McDevitt  
United States Attorney

/s/ Stephanie Whitaker  
Stephanie Whitaker  
Assistant United States Attorney

I hereby certify that on December 19, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following, and/or I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participant(s):

Phillip J. Wetzel  
Attorney at Law  
901 North Adams Street  
Spokane, WA 99201

/s/ Stephanie Whitaker  
Stephanie Whitaker  
Assistant United States Attorney

**APPENDIX D — ATTACHMENTS TO  
GOVERNMENT'S SENTENCING MEMORANDUM:  
EXHIBITS B-1 THROUGH B-3, DIST. CT. DKT.  
NO. 403-3, FILED ON DECEMBER 28, 2007**

**ATTACHMENT B-1**

**INFORMATION**

**IN THE SUPERIOR COURT  
OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN JOAQUIN**

**Information  
29766**

**The People of the State of California  
Against**

**MATTHEW ROBERT DESCAMPS**

The said MATTHEW ROBERT DESCAMPS is accused by the District Attorney of the County of San Joaquin, State of California by this Information, of the crime of a violation of Section 459 of the Penal Code of the State of California, to-wit: BURGLARY, a felony, a felony, committed as follows:

The said MATTHEW ROBERT DESCAMPS did on or about the 13th day of September, A.D. nineteen hundred seventy-eight, prior to the filing of this Information, at and in the County and State aforesaid

FILED  
78 OCT 10 AM 8:22  
CLERK OF COURT  
SAN JOAQUIN COUNTY

*Appendix D*

wilfully, unlawfully and feloniously enter a building, to-wit: CentroMart, located at 2850 North California, in the City of Stockton, with the intent to commit theft therein.

**JOSEPH H. BAKER**

District Attorney of the County  
of San Joaquin, State of California

By /s/ **JOSEPH R. DE SILVA**

**JOSEPH R. DE SILVA**

Deputy District Attorney of said County

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*Appendix D*

Police Case Original

MUNICIPAL COURT OF CALIFORNIA,  
COUNTY OF SAN JOAQUIN

Stockton Judicial District

SPD # 78-16239  
COMPLAINT  
(SEC. 459 P.C.)

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

MATTHEW ROBERT DESCAMPS

Defendant

Personally appeared before me this day Joseph DeSilva upon information and belief who being first duly sworn, complains and says that at and in the County of San Joaquin, State of California, on or about the 13th day of September, A.D. 1978, and before the filing of this complaint, one MATTHEW ROBERT DESCAMPS committed the crime of a violation of Section 459 of the Penal Code of the State of California, to-wit: BURGLARY, a felony in this, that the said defendant(s) did, at and in said Judicial District, County and State aforesaid, on or about the date aforesaid wilfully, unlawfully and feloniously enter a building, to-wit: CentroMart, located at 2850 North California, in the City of Stockton with the intent to commit theft therein.

*Appendix D*

Said complainant prays that a warrant be issued for the arrest of said defendant and that he may be dealt with according to law.

Subscribed and sworn to before me this 14th day of September, 1978

/s/ JOSEPH DE SILVA

Complainant

JOSEPH DE SILVA

MICHAEL P. KUREY  
Clerk for the Municipal Court,  
Stockton Judicial District  
County of San Joaquin,  
State of California.

By \_\_\_\_\_ Deputy Clerk

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**ATTACHMENT B-2**



PEOPLE OF THE STATE OF CALIFORNIA  
DEFENDANT: MATTHEW ROBERT DESCAMPS

☒ Present ☐ Not Present

78 DEC 6 PM 3:04

AKA:  
COMMITMENT TO STATE PRISON P.C. § 1170  
ABSTRACT OF JUDGMENT

CASE NUMBER: 29766

Hearing: 12-4-78 Dept. No. 5 Judge: CHRIS PAPA  
Reporter: SUAN BORTOLE Counsel for People: Joseph Desamp  
Counsel for Defendant: Leonard Tauman Probation Number or Probation Officer: NONE

1. Defendant was convicted of the commission of the following crimes:  
☐ Additional counts are listed on attachment 1.a.

| Count | Case | Section No. | Crime  | Date of Conviction<br>Mo. Day Yr. | Conviction by<br>Jury Trial<br>Court Trial<br>Plea | Enhancements<br>Charged and Found<br>PC 12022.1<br>PC 12022.2<br>PC 12022.3<br>PC 12022.4<br>PC 12022.5<br>PC 12022.6<br>PC 12022.7 | Additional term<br>added due to<br>enhancements<br>in sentence |
|-------|------|-------------|--------|-----------------------------------|----------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------|
| 1     | PC   | 150         | MURDER | 12-4-78                           | X                                                  |                                                                                                                                     |                                                                |

2. A. Number of prior prison terms charged and found: 0 667.5(c) felonies; 0 other than 667.5(c) felonies.  
B. Punishment for prior prison terms stricken: 0 667.5(c) felonies; 0 other than 667.5(c) felonies.

3. The time with the greatest "principal" term of imprisonment (including § 12022-series enhancements) is:

- A. ☒ In the present proceeding, Count 1. B. ☐ In a prior uncompleted sentence identified on next line.

4. Defendant is sentenced on the crime with the greatest "principal" term to state prison for the ☐ lower ☒ middle ☐ upper term of 2 years.

5. Unstayed and unstricken enhancements imposed:

- A. ☐ Penal Code § 12022(a) ☐ Penal Code § 12022(b) ☐ Penal Code § 12022.5 ☐ Penal Code § 12022.7  
B. ☐ Penal Code § 12022.5(a) ☐ Penal Code § 12022.5(b)  
C. ☐ Penal Code § 667.5(a)  
D. ☐ Penal Code § 667.5(b)

- E. Terms for consecutive sentences:

- (1) ☐ Other convictions in the present case for felonies not listed in § 667.5(c) on counts  
(2) ☐ Other convictions in prior uncompleted sentences for felonies not listed in § 667.5(c)  
(3) ☐ Other convictions in the present case for felonies listed in § 667.5(c) on counts  
(4) ☐ Other convictions in prior uncompleted sentences for felonies listed in § 667.5(c)

6. Concurrent Sentences (to be served with sentence on count identified on line 3):

- A. ☐ For convictions of the present case, counts B. ☐ For convictions of prior uncompleted sentences.

7. Of years imposed above on lines 4 through 5.E.(4), number of years stayed pursuant to California Rules of Court, Rule 447, to comply with Penal Code §§ 1170.1(a) (5-year limit) and 1170.1(f) (double-base-term limit)

8. The total unstayed prison term imposed by this judgment is 2 years.

9. Execution of sentence imposed:

- A. ☒ Initial sentencing hearing B. ☐ At resentencing pursuant to decision on appeal  
C. ☐ After revocation of probation D. ☐ At resentencing pursuant to recall of commitment (P.C. § 1170(d))

10. The court pronounced sentence on 12/04/78. Defendant is credited for time spent in custody, 62 total days, including:  
Actual Local Time 82 P.C. § 4019(b) credit State Institutions Time (specify dates of admission and release in oral proceedings and notes)

11. Defendant is remanded to the custody of the Sheriff to be delivered: ☐ forthwith ☒ after 48 hours, excluding Saturdays, Sundays and Holidays  
into the custody of the Director of Corrections at the Reception-Guidance Center ☐ Calif. Institution for Women - Folsom  
☒ Calif. Medical Facility - Vacaville ☐ Calif. Institution for Men - Colton ☐ Other: (specify)

I hereby certify the foregoing to be a correct  
abstract of the judgment made in this action.

CLERK OF SUPERIOR COURT



This form is prescribed pursuant to Penal Code § 1212.6 to satisfy the requirements of Penal Code § 1213 (Abstract of Judgment and Commitment) for defendants sentenced under Penal Code § 1170. A copy of probation report shall accompany the Department of Corrections' copy of this form pursuant to Penal Code § 12023. A copy of the sentencing proceedings and any supplementary probation report shall be transmitted to the Department of Corrections pursuant to Penal Code § 12023.01. Assessments may be used but must be incorporated by reference.

Form Adopted by the  
Judicial Council of California  
Revised Effective October 1, 1978

ABSTRACT OF JUDGMENT-COMMITMENT  
FORM CR 290

Pen C. 667.5, 1170, 1170.1, 1213.6,  
12022, 12022.5, 12022.6, 12022.7

Pink original - Court File - Yellow copy - Department of Corrections - White copy - Admitted to Prison



THE ABSTRACTED INSTRUMENT IS A CORRECT COPY  
OF THE ORIGINAL ON FILE IN MY OFFICE.  
CAUTION: SEAL MUST BE IN PURPLE.

ATTEST  
ROSA JUNQUEIRO  
NOV 28 2005  
Clerk of the Superior Court  
in and for the County of  
San Joaquin State of California

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN

DEC 4 1978

5

HON:

Chris Pappe

JUDGE

Date

Dist. No.

County Seat At: Stockton, California

David McKinney

Susan Potale

Doris Spive

People of the State of California

Counsel for People

Joseph Klesion

Deputy/Assistant District Attorney

LEONARD TALIMAN

Counsel for Defendant

vs.

Matthew Robert Alcaraga

Defendant

## MINUTE ORDER - NATURE OF PROCEEDINGS:

- ☒ Felony  
☐ Misdemeanor

To Wit:

459 PC 2nd

Action No. 24766

## PEOPLE REPRESENTED AS ABOVE, AND DEFENDANT PRESENT WITH COUNSEL.

- ☐ 30501 Defendant not appearing as ordered.  
☐ 30404 Defendant returned from CRC Per Sec. 3050/3051 W.S.  
☐ Defendant from Diagnostic (1203.03 PC).  
☐ Defendant returned from \_\_\_\_\_ per Sec. \_\_\_\_\_  
☐ 30405 Civil Commitment to CRC revoked.  
☐ 30406 Criminal proceedings reinstated.  
☐ Defendant waives formal hearing/procedural defects.  
☐ The matter is submitted on the separate written medical reports of the doctors heretofore appointed.

and the Court finds said person is/is not \_\_\_\_\_

Not allowed 2 phone calls

- ☐ 30468 The matter is submitted on P.O. Report.  
☒ Defendant waives statutory time for \_\_\_\_\_  
☐ Waiver personal appearance for \_\_\_\_\_  
☐ 30533 Referred ☐ 30534 Waiver to Probation Officer for presentence report.  
☐ Defendant not accepted by California Youth Authority.  
☐ Report/Chrono memo of the Probation Officer is received and considered.  
☒ Defendant waives time for Pronouncement of Judgment.  
☒ Defendant is arraigned/waives arraignment for pronouncement of judgment.  
☒ Defendant states there is no legal cause why judgment should not be pronounced.

## IT IS ORDERED:

- ☒ Probation is ☒ 30418 denied ☐ 30419 revoked  
☐ 30420 reinstated ☐ 30421 granted  
☐ 30422 modified  
☐ 30423 Imposition sentence suspended \_\_\_\_\_ years.  
☐ 30424 Informal probation \_\_\_\_\_ years granted.  
 Conditions \_\_\_\_\_  
☐ 30425 Conditions as announced in court.  
☐ 30427 Defendant is committed to the California Youth Authority for the term prescribed by law.  
☐ Defendant is ☐ 30428 committed ☐ 30429 sentenced  
☐ 30430 Criminal proceeding \_\_\_\_\_ suspended and defendant committed to \_\_\_\_\_ for care and treatment.  
☐ 30431 Execution of sentence is stayed \_\_\_\_\_  
☒ 30432 Defendant is sentenced to State Prison for the term \_\_\_\_\_  
 prescribed by law. C/T/S. 82 days  
☐ 30433 Sentences shall be served in respect to one another as follows: \_\_\_\_\_  
☐ 30434 And in respect to any prior incomplete sentence(s) as follows: \_\_\_\_\_  
☐ 30435 Court informs defendant of legal rights to Appeal.  
☐ 30436 Criminal proceedings are adjourned and defendant is referred for acceptance for a 90-day period of diagnostic evaluation and report, pursuant to Section 1203.03 P.C.

- ☐ Hearing on: ☐ 30440 doctor's reports ☐ 30547 P.B. ☐ motion is set for/cont'd to \_\_\_\_\_  
☐ 30444 Defendant is remanded back to \_\_\_\_\_ for further hearing on \_\_\_\_\_  
☒ Defendant is remanded to the custody of the ☒ 30549 Sheriff ☐ 30446 D.V.I.  
☐ 30447 Defendant is permitted to remain at liberty \_\_\_\_\_ on ☐ 30555 own recognizance:  
 on ☐ 30452 bail heretofore posted.  
☐ 30538 Bench warrant issued for arrest of defendant. ☐ 30539 Bench warrant issued \_\_\_\_\_ is recalled.  
☐ 30452 Bail is fixed in the amount of \$ \_\_\_\_\_  
☐ Bail Bond No. \_\_\_\_\_ in the amount of \$ \_\_\_\_\_ is ☐ 30453 forfeited ☐ 30454 exonerated. ☐ 30554 Reduction  
 in bail ☐ 30555 O.R. release \_\_\_\_\_  
☒ The Sheriff of San Joaquin County is hereby ordered to deliver the defendant to:  
☒ 30455 Reception Guidance Center at \_\_\_\_\_ ☐ 30456 California Institution for Women at \_\_\_\_\_  
☐ 30457 A place and time as directed by the California Youth Authority

Dated: DEC 4 1978

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cc: Ed Jant &amp; P.O. 1203-2

Chris Pappe  
Judge of the Superior Court

CC-00104 (10/77)

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*Appendix D*

**ATTACHMENT B-3**

[SEAL OMITTED]

[1] SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF SAN JOAQUIN

No. 29766  
Dept. No. 5

**STATEMENT FOR PRISON OFFICIALS**

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

**Plaintiff**

**vs.**

**MATTHEW ROBERT DESCAMPS,**

**Defendant**

The above-entitled matter came on regularly for hearing on Monday, December 4, 1978, at the hour of 9:00 o'clock a.m. thereof, before HON. CHRIS PAPAS, Judge of the Superior Court of the State of California, for the purpose of pronouncement of judgment.

**APPEARANCES OF COUNSEL**

JOSEPH DE SILVA, Deputy District Attorney, County of San Joaquin, Courthouse, Stockton, California, appeared as counsel for and on behalf of the People.

FILED  
78 JAN 5 AM 9:49  
KATHY A. SPENCER CLERK  
BY EMANUEL GENE BUTLER  
DEPUTY

*Appendix D*

LEONARD TAUMAN, Deputy Public Defender, 26 South San Joaquin Street, Stockton, California, appeared as counsel for and on behalf of the Defendant.

[2]

(All parties present, the following proceedings were had:)

THE COURT: The matter of the People vs. Matthew Robert Descamps.

MR. TAUMAN: That matter is ready, Your Honor. I have discussed the matter with Mr. Descamps and Mr. DeSilva of the District Attorney's Office. It is my understanding that if the Court gives leave to withdraw our previously entered plea of not guilty and enter a new and different plea of guilty that the District Attorney's Office would stipulate that the proper term for this matter is the middle term, and would also stipulate that there is—that it was a second degree burglary on September 13, 1978. With that understanding, my client is prepared to move leave of the Court to change his plea.

THE COURT: Is that what you want to do, Mr. Descamps?

MR. DESCAMPS: Yes, Your Honor.

THE COURT: All right. So I'll grant your request and motion.

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Now, the information filed against you charges you with a violation of Section 459 of the Penal Code. That's burglary, a felony. Do you understand the charges?

MR. DESCAMPS: Yes, Your Honor.

THE COURT: And what is your plea, sir?

MR. DESCAMPS: Guilty.

THE COURT: Now, before the Court accepts your plea of guilty, I'm going to explain to you what the effect of [3] that plea is and your rights which you're giving up. Can you hear me all right?

MR. DESCAMPS: Yes, sir.

THE COURT: Do you want to come up here?

MR. DESCAMPS: No, that's fine.

THE COURT: That's fine. Okay.

Now, before the Court accepts your plea of guilty, I'm going to explain to you what the effects of that plea is and the constitutional rights that you're giving up by entering this plea. If you don't understand me, please stop and ask me.

Now, by entering the plea of guilty you're giving up your right to a trial by jury, a constitutional right; do you understand?

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MR. DESCAMPS: Yes, Your Honor.

THE COURT: And this is what you want to do?

MR. DESCAMPS: Yes, Your Honor.

THE COURT: Now, also, you're giving up your constitutional right to have witnesses at that trial testify in your behalf and a constitutional right to cross-examine any witness that testifies against you; you understand that?

MR. DESCAMPS: Yes.

THE COURT: And you're giving up these rights?

MR. DESCAMPS: Yes.

THE COURT: Now, you also have a constitutional right against self-incrimination, which means that nobody can force you to be a witness against yourself or to give [4] testimony in any way involving or incriminating yourself; do you understand that?

MR. DESCAMPS: Yes.

THE COURT: And you're giving up this constitutional right?

MR. DESCAMPS: Yes.

THE COURT: Are you giving up these constitutional rights voluntarily?



*Appendix D*

MR. DESCAMPS: Yes, Your Honor.

THE COURT: No one is forcing you to do it, are they?

MR. DESCAMPS: No, Your Honor.

THE COURT: Now, it's been indicated here that you're offering to enter this plea of guilty with the understanding that the Court would impose middle state prison term of two years; do you understand that?

MR. DESCAMPS: Yes, Your Honor.

THE COURT: And this would be burglary in the second degree.

MR. DESCAMPS: Yes.

THE COURT: All right. Now, other than this has anybody made you any kind of a promise to have you give up these constitutional rights?

MR. DESCAMPS: No, Your Honor.

THE COURT: Other than this has anybody made any kind of a promise concerning sentencing in this case?

MR. DESCAMPS: No.

THE COURT: No. You're entering a plea of [5] guilty because you are guilty?



*Appendix D*

MR. DESCAMPS: Yes, Your Honor.

THE COURT: Is there a factual basis for the entry of the plea of guilty, Mr. Tauman?

MR. TAUMAN: There is a factual basis.

THE COURT: Do you concur in that, Mr. DeSilva?

MR. DE SILVA: Yes, Your Honor.

THE COURT: In substance, what does this involve?

MR. DE SILVA: This involves the breaking and entering of a grocery store.

THE COURT: On North California Street?

MR. DE SILVA: Yes, Your Honor.

THE COURT: All right. The Court will accept a plea of guilty to a violation of Section 459 of the Penal Code, and, gentlemen, it is stipulated it's burglary in the second degree, is that correct?

MR. DE SILVA: Yes, Your Honor.

MR. TAUMAN: So stipulated.

THE COURT: Burglary in the second degree, a violation of Section 459 of the Penal Code, burglary. Let the record reflect that Mr. Descamps waives his constitutional rights to trial by jury; to have witnesses

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testify in his own behalf; to cross-examine any witness that testified against him as well as his constitutional rights against self-incrimination; and that these rights were expressly waived, freely and voluntarily waived. That the plea of guilty was freely and voluntarily made, and that there is a [6] factual basis for the entry of a plea of guilty.

MR. TAUMAN: Your Honor, I would like the record to reflect that there is a hold on Mr. Descamps from Nevada City, I believe. A CYA hold. I've discussed it with him, and he indicates he prefers to handle that matter in Nevada City by himself rather than have that handled through our office.

Further, I would advise the court that in speaking with Mr. Descamps I have discussed with him the advantages of a probation report. He indicates that he does not wish to have a probation report filed in this matter. He is anxious to have—

THE COURT: You should, Mr. Descamps. You're a young man.

MR. DESCAMPS: Yes, but I don't get along with these people at all, not at all. I don't want nothing to do with them.

THE COURT: Let me say this. The thing that disturbs me is this: Very frankly, you have a CYA parole hold. Apparently there's no violation involved, and you've got a good chance of going to Susanville or going up here to Jamestown to a less structured setting. You have everything to lose and nothing to gain.

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MR. DESCAMPS: No, Your Honor, I don't want to tell anybody else about my life or anything about my parents and all that junk. It's none of their business. I don't want to tell them nothing.

MR. TAUMAN: Your Honor, I've discussed it [7] with him at some length, and I think he is well aware of the advantages and disadvantages, and he is making a knowing choice.

THE COURT: You don't want it referred?

MR. DESCAMPS: No, Your Honor.

THE COURT: You concur in that, Mr. Tauman?

MR. TAUMAN: Your honor, it's not much of a question of concurring or not concurring. I've discussed it with him. I think he's making a knowing and intelligent choice in waiving the probation report. I think he understands the advantages and disadvantages and feels that the disadvantages would outweigh the advantages. I certainly have no disagreement with that. I don't know whether I concur with it or not, but I can certainly understand his viewpoint.

THE COURT: Well, he can do it if he wants to, and I'll permit him to do it but I think it seems to me that there is some benefit that can be derived of it. But do you want to waive it, Mr. Descamps?

MR. DESCAMPS: Yes, Your Honor.

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THE COURT: All right. I'll grant your request.

Now, what about pronouncement of judgment? Does he want to waive that, also?

MR. TAUMAN: We would waive time for pronouncement of judgment.

THE COURT: Now, you understand you have a legal right to have the matter of judgment referred for [8] awhile; do you understand that?

MR. DESCAMPS: Yes, Your Honor.

THE COURT: And you want to waive that, too?

MR. DESCAMPS: Yes, Your Honor.

THE COURT: Do you concur in that, Mr. Tauman?

MR. TAUMAN: I would, Your Honor, with this one caveat. Mr. Descamps has his parents in Los Angeles, and they have been very concerned about this matter since the outset. I would ask that the Court consider granting him two phone calls so that he can discuss with them exactly what happened in court and so forth.

THE COURT: I'll permit him to do that.

All right. Does he waive formal arraignment for pronouncement of judgment?

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MR. TAUMAN: So waived.

THE COURT: Is there any legal cause why sentence should not now be pronounced?

MR. TAUMAN: There is none.

THE COURT: Let the record reflect that the Court is aware of the preliminary transcript in this matter and the facts and circumstances surrounding his alleged offense. And the defendant having waived formal arraignment for pronouncement of judgment, and that he further waive the time for pronouncement of judgment; and there being no legal cause why judgment should not now be pronounced, it will be the judgment and the sentence of the Court that for a violation of Section 459 of the Penal Code of the State of California, to-wit, burglary in the second degree, a felony, [9] the defendant is confined to prison in state prison for the median term of two years.

He's got credit for time served. He's remanded to the custody of the sheriff for delivery to the Reception and Guidance Center at Vacavilla, California.

MR. TAUMAN: Your Honor, there is an order for two phone calls then?

THE COURT: Yes. I'll order that he be permitted to make two phone calls.

How long have you been in custody, Mr. Descamps? Do you know that, sir?

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*Appendix D*

MR. DESCAMPS: Two months. Two and a half months. Since September 14th.

THE COURT: All right.

\* \* \* \* \*

**APPENDIX E—EXCERPTS OF TRANSCRIPT OF  
SENTENCING HEARING HELD ON JANUARY  
4TH 2008, PAGES 58-74, DIST. CT. DKT. NO. 426**

\* \* \* \* \*

[58] occurred in his younger years in California, which was an incredibly violent criminal history. But also, his confrontation with authority goes beyond. He has other violent offenses with individuals within his family. And in that case, that's an aggravating case, because of the age of his child at the time of that assault. And I think that the defendant and Mr. Niesen want to paint this picture that he can't control himself and that law enforcement aggravates that. Well, I think that that's not the case. I think that Mr. Descamps chooses to not like law enforcement, chooses to have a disposition towards law enforcement that creates a dangerous situation and that confronts law enforcement to the point where it's not only dangerous to them but that also, Mr. Descamps then, in turn, assaults law enforcement. I think that's an aggravating factor.

I also think it's interesting—with respect to controlling behavior, Mr. Descamps controlled himself in front of that jury. He can choose to control himself when he wants. The problem is he chooses not to control himself specifically when confronted with authority or in situations where he becomes upset in the instance involving his son and that prior criminal history. I think that Mr. Descamps could but doesn't, and there's a specific danger and threat to law enforcement but also the community at large. So I would just have those additional comments, Your Honor.



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THE COURT: Thank you. I think it's appropriate to [59] deal with the legal issues. Those relate to the several objections and issues raised dealing with the pre-sentence report that's been prepared. I guess the first issue is whether or not there are two felony convictions for crimes of violence, because the base offense level determined of 24 requires that there are at least two felony convictions for crimes of violence to find that level 24. And that's probably the crux—as Mr. Niesen has said, the real core issue this Court is confronted with in this matter.

I find it clear and believe it to be so that the 1976—and that's some time ago, as Mr. Descamps has pointed out—but the law provides that the Court must consider all the offenses. The 1976 California robbery is a case that does entail a violent felony. A violent felony is a crime punishable by imprisonment for a term exceeding one year that has as an element the use, attempted use, or threatened use of physical force against the person of another. I think that there's no question that the robbery, as defined under the California Penal Code, Section 211, states that robbery is the felonious taking of personal property in the possession of another from his person or immediate presence, against his will, accomplished by means of force or fear. There is clearly the use of or threatened use of physical force involved in the commission of a robbery; and therefore, a violation of that particular section of the California code involving robbery categorically constitutes a [60] crime of violence under the law.

Burglary is a case where the United States Supreme Court has tried to make it clear that burglary requires—

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under—to be to qualified as some form of—crime of violence, there has to be a generic common denominator for burglary. That's I think designed to provide for a national standard to be considered in being able to say: What is a burglary? Because burglary is referred to as a potential crime of violence, but not all burglaries are crimes of violence. And the statutory provision is that it must—the crime must require proof the defendant committed an unlawful or unprivileged entry into or remaining in a building or other structure with intent to commit a crime. I think that means in most instances, burglary requires the Court to use this modified categorical approach and look at the documents.

Now, the court has—our Supreme Court and the Ninth Circuit has, I think, laid out the concept that the documents to be considered are those that are court file documents that have—and review those and consider those that relate. So you don't consider police reports and the like. You consider the court documents that have—involve court proceedings, principally.

In reviewing that in this case, looking at the documents—and those are found in the exhibits that are the B series—the charging document—it is the information—alleges that on or [61] about the 13th day of September of 1978, Mr. Descamps willfully, unlawfully, and feloniously entered a building; to wit: the CentroMart located at 2850 North California in the city of Stockton with the intent to commit a crime therein. There is then a plea of guilty entered. And there is a transcript of the colloquy, in which there is indication that this was a

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breaking and entering of a grocery store. The defendant acknowledged that—I believe that he was pleading guilty to a violation of the section 459 penal code, burglary. I'm satisfied that the documentation in this matter does show that this was a crime of violence, and under the modified categorical approach.

Now, the assault matters create the same kind of analysis that needs to be done. And it's interesting that—I refer to *United States v. Sandoval*—it's at 390 F.3d 1077, Ninth Circuit, 2004—that, in fact, in looking at the Washington assault statute, the Ninth Circuit states unlawful—an unlawful touching that does not involve substantial physical force or serious risk of physical injury is not viewed as—you know—a use of substantial physical force. I think what the court is trying to say is that just because you touch somebody with an unprivileged touching, that isn't the assault that's intended. And that's where this degree of force gets involved. What's interesting is the Eleventh Circuit disagrees with this concept, for whatever that's worth. And it may be that sometime, the United States Supreme Court will take a look at [62] that. But in *United States v. Griffith*, 455 F.3d 1339—it's Eleventh Circuit 2006—it addresses *Belless*—*Belless*—excuse me—which is a Ninth Circuit 2003—*United States v. Belless*, 338 F.3d 1063, where I think they're trying to make the distinction between this unprivileged touching is not a crime of violence compared to an assault that does involve some significant amount of physical force—reviewing that and applying that rationale, I—clearly, what's reflected in using in the modified categorical approach, the defendant acknowledged that he

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had resisted arrest where he is alleged to have assaulted a Washington state trooper, Trooper Frizzell—there's some assault—and indicated—but in reviewing the documents, while it's clear that it was assault in the third degree, the statement on plea of guilty reflects that police officers came to his parents' home to arrest him—and this was in December 20th, '90. The defendant acknowledged he resisted arrest, but he didn't try to assault anyone. But there's nothing else that I can find to indicate what the extent of the involvement was in an effort to demonstrate and show that there's a basis to say there was more than unprivileged or unlawful touching. And thus, I don't find that to be a sufficient basis for this Court to say that assault in the third degree as charged and pled in that case did—does constitute a crime of violence under the federal law.

There is the other case out of Spokane County in 1998 which [63] runs into the same issue. A jury finds the defendant guilty of assaulting Deputy Jack Rosenthal. And looking at the documents there, the Court is confronted with the fact that—the finding of facts of the trial judge—on page 2 of those findings and conclusions: "At some point defendant assaulted one of the law enforcement officers when he was under arrest and handcuffed. While the court does not condone defendant assaulting a law enforcement officer, the court finds that this was a relatively insignificant assault, that the law enforcement officer was not injured, did not lose his balance, nor fall . . . ." I'm confronted with what I view as this distinction about what an unlawful touching, unprivileged touching constitutes an assault sufficient under the Ninth Circuit to



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view this as a violent crime or not. And when the trial judge makes that finding, it forces the same circumstance here. Was this just someone jabbing their finger in somebody's chest or yelling or hollering, or was it somebody who actually struck the officer hard by striking an officer, or another person—an assault with a fist or a weapon or whatever? Anyway, I arrive at the conclusion that that doesn't qualify as a—for the reasons I've indicated, as a crime of violence.

That then leaves the issue involving the other crime that's the basis of this, is the harassment matter. And I—and I think in this case, the *United States v. Ladwig*, L-a-d-w-i-g, 432 F.3d 1001, Ninth Circuit 2005, involved a statute in the [64] state of Washington that has similar contentions and allegations in terms of what is required. And this involved a telephone call that was—involved harassing and threats. And under the statute which that was charged, RCW 9.61.230, it is very, very similar and parallel in the approach to the statute involving Mr. Descamps—RCW 9A.46.020. Under the telephone harassment statute, 9.61.230, “[e]very person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such (other) person”—and it talks about these things being gross misdemeanors. And he said the person is guilty of a Class C felony under the law if either of the following applies. And one of them is (2)(b), that person harasses another person under (1)(c) by making a phone call or comments or the like by threatening to kill the person threatened or another person. Well, it seems to be very analogous, if not the same thing, that the harassment statute says that

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was the basis of the conviction involving Mr. Descamps. And the information—the amended information makes it clear that Mr. Descamps on March 22nd, 2000, in Pend Oreille County, Washington, without lawful authority did knowingly threaten to kill Judge Philip J. Van de Veer, the person threatened, all contrary to the statute. And again, it talks about unlawful—without lawful authority a person knowingly threatens to cause bodily injury or harm immediately or in the future to a person threatened, to another—or [65] another person. And it goes into all of the provisions and then says these are—this is a gross misdemeanor. However, it becomes a Class C felony if the defendant harasses another person under the statutory provisions by threatening to kill the person threatened or another person. It's analogous. It's so close that it appears to me it's the same concept. And that—on *Ladwig*, the court said that using the categorical approach, you simply look at the elements under the statute to determine if, in fact, the crime is a crime of violence or not. It goes on—I'm going to just quote from the case. On page 1,004: "We have not previously decided whether making a harassing telephone call qualifies as a violent felony for the purpose of the ACCA"—The Armed Career Criminal Act. "The Washington statute generally makes it a gross misdemeanor to make harassing telephone calls, but it characterizes the conduct as a felony if the caller threatens to kill." And it goes on to say, citing the statute 9.61.230: "The only way to be convicted of a felony under this subsection is to threaten to kill." Well, now, that's one of the ways. But it clearly requires that—and it says because the statute treats felony conduct that qualifies as a violent felony under the ACCA, a felony conviction under this

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provision qualifies as a violent felony. Stated differently, the statutory provision charging a felony requires for conviction and felony punishment that there has been a threat to kill; and that would include the threatened use of violence.

[66 ] I think the categorical approach is applicable as it relates to the conviction under RCW 9A.46.020 involving Mr. Descamps. So that categorical analysis—the result is that there are three—in the analysis, there are three underlying crimes of violence involving Mr. Descamps.

Clearly, the base offense level is accurate of 28. 24 is the base offense level. That is increased 4 levels because the defendant, the contention is, did use or possess a firearm or ammunition in connection with another felony offense. I think there's sufficient basis to say, clearly, there was assaultive action; if not assaultive action, clearly, reckless endangerment in this matter, such that there is a felony offense involved, the reckless endangerment being the firing of a firearm if not directly at a person, towards that person's direction, resulting in that firearm discharging a bullet into the radiator of the truck in which another person was seated. And then the chase and pursuit—now, that, I'm not sure. The possession of the firearm I think was part of the rationale for wanting to leave and get out of the area.

Now, having said those things, the Court determines that while that level 28 is there, I would have to say that there is no basis under the law addressing the sentencing guidelines to say that there's been acceptance



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of responsibility. The defendant was cooperative with law enforcement in terms of speaking with them, in terms of pointing out other firearms that [67] he thought should be turned over to law enforcement; and he did do that. I don't—I don't think that's in issue. But in terms of accepting responsibility for possession of the firearm involved in this matter, that's not shown. And thus, that is not applicable. Based upon the application of the ACC, the base offense level is 34; and that is not—there's no adjustment for responsibility. And applying the provisions of the ACC, the Court does determine that the criminal history category is Roman numeral VI. The guideline range under the law is 262 months to 327 months.

I reviewed the other objections made on behalf of defendant. Most of them don't—to the extent that those relate to the felony conviction and their applicability under—as crimes of violence, those have been addressed. Many of the other objections relate to things that don't really deal with the application of the sentencing guidelines; and thus, they're really not matters that the Court needs to rule on as such for those reasons.

I would have to say, in regard to Mr. Descamps' concerns about the statements that were made and whether or not they were accurate, as I recall the evidence and the hearings that went on, there was an effort on the part of the law enforcement, the ATF officer, to at least videotape, if not otherwise tape record, the interview that went on in the Stevens County Jail. That didn't work. The system didn't work. It wasn't able to do [68] it. I very much would prefer to see statements taken from

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defendants recorded in one form or another to eliminate this discussion about who said what and when and what evolved.

The testimony was presented. I made the rulings I did. The jury heard the testimony. And based upon that, the jury found the defendant guilty of possession of a firearm and went into the possession of firearm and ammunition as to all items involved, and exhibits.

Taking into consideration also the various provisions of 18 United States Code, Section 3553(a), it's—the Court is directed to fashion a sentence that's sufficient but not greater than necessary; and it's designed to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence to criminal conduct, protect the public from future crimes of the defendant, and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most efficient—effective manner.

It is to consider the nature and circumstances of the offense and the history and characteristics of the defendant. The possession of firearm and ammunition is not, per se, a crime of violence. In this circumstance, interrelated with its possession, it had a potential of a very violent circumstance—a potential. No one was shot. No one was injured. But the potential for that was clearly there. I mention that because—[69] taken into context. But the crime itself is not a crime of violence, per se.

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Now, Mr. Descamps—his report indicates—his presentence report—he's 50 years of age. Single father. One son. I think he does have significant and serious mental health problems, and those are explained. And they're replete in the report. Section 163 goes into the analysis and the information provided in a report that was provided to this Court previously. It involves a history of methamphetamine dependence, inactive in a controlled environment; a history of attention deficit hyperactivity disorder; a history of alcohol dependence—long in remission; a history of polysubstance abuse, inactive in a controlled environment; antisocial personality disorder; and then a history involving a concussion. And I suspect that involved an altercation that occurred in a bar, as I recall, where the defendant was struck. And it did have a significant impact on him. But it also is clear from the information that the defendant is very impulsive and acknowledges at times he's not able to control himself; and he can become abusive to people when he conducts himself in those ways. And the other thing that is to be mentioned is that he has a significant substance abuse problem. And it points out that he started drinking alcohol at age ten and started taking intravenous drugs at age ten. And he's tried a variety of drugs over a period of time—heroin; some cocaine; marijuana a long [70] time ago; and, more recently, methamphetamine.

He previously has had a history of employment. He was a painter and commercial fisherman. But for the most recent period of time, he has a Social Security disability; and he is receiving monetary compensation for that. He also has health problems that entail not

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only dental—I think some significant dental problems that need to be addressed, but even—there is a concern with the fact that the defendant does have illnesses that need to be addressed as well. There's an indication that tests have confirmed positively for Hepatitis B as well as positive tests for Hepatitis C. Those are serious medical conditions.

The Court is concerned with the deterrence to future conduct and protecting the public from future crimes of the defendant. The concern this Court has is that the defendant seems to become agitated or angry, and that escalates. Maybe he can't always control it, but the escalation creates circumstances that become assaultive. And when you mix firearms and the use of unlawful controlled substances, methamphetamine, and firearms, you have a very explosive and dangerous circumstance involving other people and people around the defendant. I know he's indicated he didn't—in statements made that he didn't intend it to hurt anybody; but that doesn't change the fact that the potential for significant harm, including death, was involved here. I can't ignore that, and [71] don't. I think the defendant does need some medical care, both in the form of medical treatment, dental treatment, and treatment for mental health concerns and issues. He also needs to be involved in substance abuse counseling and treatment programs.

Restitution is not an issue in this matter.

Mr. Descamps, would you please stand? In accordance with the sentencing guidelines being advisory, as they are, and the provisions of 18 United States Code, Section

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3553(a), based upon the jury's verdict finding you guilty of the crime of felon in possession of a firearm and ammunition, it is the order of the Court that you be committed to the custody of the United States Bureau of Prisons for a term of 262 months; that you pay the special penalty assessment of \$100, which is subject to the Inmate Financial Responsibility Program. The Court determines you do not have the ability to pay a fine and waives a fine. You are placed on five years' supervised release. The standard conditions shall apply.

In addition, special conditions shall apply. You shall complete a mental health evaluation and follow any treatment recommendations, including taking prescribed medications as recommended by the treatment provider. You shall allow a reciprocal release of information between the supervising probation officer and treatment provider. You shall contribute to the cost of treatment according to your ability. You shall [72] take medications as recommended and prescribed by mental health treatment providers.

You shall submit to the search of your person, residence, office, or vehicle conducted by a United States probation officer at sensible times and manners, based upon reasonable suspicion of contraband or evidence of violation of a condition of supervision located in any one or all of those areas. Failure to submit to search may be grounds for a revocation in and of itself of supervised release. You shall warn or advise persons with whom you share a residence or any of these other areas that these conditions—premises are subject to search.



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You shall undergo a substance abuse evaluation and, if indicated, enter into and successfully complete an approved substance abuse treatment program, including aftercare, and contribute to the cost of that treatment according to your financial ability, and, again, allow reciprocal disclosure between a probation officer and a treatment provider so they can communicate about your treatment.

You shall abstain from the use of illegal controlled substances and shall submit to urinalysis testing as directed by your probation officer, but no more than six tests per month, to confirm continued abstinence from these substances. Also, you shall abstain from the use of alcohol and shall submit to testing, including urinalysis and Breathalyzer, as directed by your probationer officer, but no more than six tests per month, [73] to confirm the continued abstinence from the use of alcohol.

You shall cooperate in the collection of DNA as directed by your probation officer, in accordance with federal law.

I will recommend that you be given credit for the time that you've been detained in federal custody. I will recommend that you be allowed to participate in all mental health counseling and treatment programs that are available under the—that you're eligible for in the Bureau of Prisons and that you be allowed to participate in any and all substance abuse treatment that is applicable and you qualify for as well, and that you—as the written request indicated, you ask to be placed the closest to Colville,

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Washington, as you qualify for; and I would grant that request as well and provide that you be so designated.

Mr. Descamps, you have the right to appeal the Court's determinations and the jury's determinations in this matter. If you wish to appeal, you must file a written notice of appeal with the Clerk of the Court. That has to be filed within ten days of filing the judgment. If you don't file it within that ten days, you lose your right to appeal. You have the right to request and have an attorney represent you on appeal at no cost to you if you can't afford an attorney. You have the right to request and have the necessary papers and transcripts and documents provided for your appeal, also at no cost to you if you can't afford it. Do you understand those rights I've [74] explained to you?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Those are—you understand those.

In accordance with the motion made by Mr. Niesen, he would be allowed to withdraw as counsel in this matter at this time and with the provision being made that the matter will be referred promptly to the United States magistrate judge for the assignment of counsel to pursue any appeal you wish to make, Mr. Descamps. And I would just provide that, Mr. Niesen, you may be allowed to file the notice of appeal, if that's what Mr. Descamps wishes to do.

MR. NIESEN: Your Honor —

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THE COURT: But that will not—that will not in any way require you to proceed forward in the case, but simply as an assistance to him at this time.

MR. NIESEN: I will file a notice of appeal on his behalf. Yes. That would be fine.

THE COURT: All right. That will be all, then, in this cause. That concludes this matter. Court will be in a short recess to take up the next matter on the calendar. Court stands in recess.

(The proceedings recessed at 11:16 a.m.)

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**APPENDIX F — FINDINGS AND CONCLUSIONS  
OF THE UNITED STATES DISTRICT COURT,  
EASTERN DISTRICT OF WASHINGTON,  
FILED JANUARY 9, 2008**

**UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF WASHINGTON**

**No. CR-05-104-FVS**

**UNITED STATES OF AMERICA,**

**Plaintiff**

**v.**

**MATTHEW R. DESCAMPS,**

**Defendant**

**FINDINGS AND CONCLUSIONS**

**CLERK'S ACTION REQUIRED**

**THE DEFENDANT** came before the Court for sentencing on January 4, 2008. He was represented by Jeffrey S. Niesen. The government was represented by Assistant United States Attorney Stephanie A. Whitaker.

**BACKGROUND**

The defendant was convicted of the crime of Felon in Possession of a Firearm. 18 U.S.C. § 922(g)(1). He acknowledges that he has five prior felony convictions. The government alleges that all five are violent felonies

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for purposes of the Armed Career Criminal Act ("ACCA"). 18 U.S.C. § 924(e)(1).

**ACCA**

The defendant is not entitled to have a jury determine whether he qualifies as an armed career criminal. *United States v. Smith*, 390 F.3d 661, 666 (9th Cir. 2004), *as amended*, 405 F.3d 726 (9th Cir.2005). It is the Court's responsibility to make that determination. *See id.* The government must prove by a preponderance of the evidence that the defendant had been convicted of three violent felonies prior to committing the instant offense. *See United States v. Phillips*, 149 F.3d 1026, 1033 (9th Cir. 1998). The government has carried its burden. The defendant qualifies as an armed career criminal under § 924(e)(1).

1976 California Robbery

"The ACCA defines a 'violent felony' as 'any crime punishable by imprisonment for a term exceeding one year . . . that has as an element the use, attempted use, or threatened use of physical force against the person of another.'" *United States v. Ankeny*, 502 F.3d 829, 840 (9th Cir. 2007) (quoting 18 U.S.C. § 924(e)(2)(B)(i)). During 1976, the defendant entered a plea of guilty in a California court to the crime of robbery. The crime to which the defendant pleaded guilty is defined by § 211 of the California Penal Code. At all times relevant to this action, § 211 stated, "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will,

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accomplished by means of force or fear.” Since § 211 contains the element required by § 924(e)(2)(B)(i) (*i.e.*, the “use or threatened use of physical force against the person of another”), a violation of § 211 constitutes a violent felony under the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). See *Ankeny*, 502 F.3d at 840 (summarizing the holding of *United States v. Melton*, 344 F.3d 1021, 1026 (9th Cir. 2003)).

1978 California Burglary

During 1978, the defendant entered a plea of guilty in a California court to the crime of burglary as defined by § 459 of the California Penal Code. “Burglary” is one of the crimes listed in 18 U.S.C. § 924(e)(2)(B)(ii). When Congress listed burglary, it meant burglary in “the generic sense in which the term is now used in the criminal codes of most States.” *Taylor*, 495 U.S. at 598, 110 S.Ct. at 2158. In order for a burglary to constitute a “generic” burglary, the statute defining the crime must require proof that the defendant committed “an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.” Some states have adopted a definition of burglary that is broader than the generic definition. In a number of states, a person may be convicted of burglary by entering a structure other than a building—a car, for example. *Shepard v. United States*, 544 U.S. 13, 17, 125 S.Ct. 1254, 1257-58, 161 L.Ed.2d 205 (2005). The government correctly concedes that the definition of the term “burglary” which is set forth in § 459 is broader than the generic definition. *United States v. Smith*, 390 F.3d 661, 664 (9th Cir. 2004) (§ 459 does not “require that

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the entry be unlawful, nor does it require that the entry be into a building”), as *amended* 405 F.3d 726 (9th Cir. 2005). Thus, the Court cannot say categorically that the defendant’s conviction is a burglary for purposes of 18 U.S.C. § 924(e)(2)(B)(ii). That is not the end of the matter, of course. Under the “modified categorical approach,” the defendant’s burglary conviction qualifies as a violent felony if, when pleading guilty in state court, he admitted the elements of a generic burglary. *See Smith*, 390 F.3d at 664. However, the record of the state-court proceeding must demonstrate that he “necessarily” admitted the elements of the generic offense. *Shepard*, 544 U.S. at 26, 125 S.Ct. at 1263. Not all documents that are filed in state court provide reliable guidance. In determining whether the defendant necessarily admitted the elements of a generic burglary, the Court is “limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.” *Id.* The government has filed copies of a number of documents. The Information charged the defendant with unlawfully entering a building, which it described as “CentroMart,” with “the intent to commit theft therein.” During the change-of-plea hearing, the prosecutor stated that the crime “involve[d] the breaking and entering of a grocery store.”<sup>1</sup> Read together, these statements demonstrate that the defendant necessarily admitted the elements of a generic burglary.

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<sup>1</sup> The Court may rely upon the prosecutor’s statement since it was made in the defendant’s presence on the record and he did not object. *See United States v. Hernandez-Hernandez*, 431 F.3d 1212, 1219 (9th Cir. 2005) (discussing *Smith*, 390 F.3d at 666).

*Appendix F*1991 Washington Assault

During 1990, the defendant entered a plea of guilty in a Washington court to the crime of assault in the third degree. RCW 9A.36.013(1). He was sentenced during 1991. As noted above, the ACCA defines a “violent felony” as a crime that “has as an element the use, attempted use, or threatened use of physical force against the person of another[.]” 18 U.S.C. § 924(e)(2)(B)(i). In a case interpreting U.S.S.G. § 4B1.2(a), the Ninth Circuit held that a conviction for third-degree assault in the State of Washington is not categorically a crime of violence because it is possible to violate RCW 9.36.031(1) “through an unlawful touching that does not involve *substantial* physical force or *seriously* risk physical injury.” *United States v. Sandoval*, 390 F.3d 1077, 1081 (9th Cir.2004) (emphasis added) (citing *United States v. Belless*, 338 F.3d 1063, 1068 (9th Cir. 2003)), *cert. denied*, 543 U.S. 1075, 125 S.Ct. 920, 160 L.Ed.2d 814 (2005).<sup>2</sup> Given the Ninth Circuit’s interpretation of RCW 9.36.031(1), the government properly concedes that a violation of that statute is not categorically a violent felony. Nevertheless, the government argues that the defendant admitted facts in state court sufficient to establish that his 1991 assault conviction qualifies. If the Ninth Circuit applies the reasoning of *Belless* and *Sandoval* in this context, the government is incorrect. The only description of the defendant’s conduct is the one contained in the “Statement of Defendant on Plea of Guilty.” It states in pertinent part, “[Defendant] did resist arrest though [defendant] did not try to assault anyone.” Since this statement does

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<sup>2</sup> In *Belles*, the Ninth Circuit analyzed 18 U.S.C. § 921(a)(33) (A)(ii).



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not describe the defendant's actual conduct, the Court cannot find by a preponderance of the evidence that he necessarily committed an unlawful touching that involved either substantial physical force or a serious risk of physical injury. *Sandoval*, 390 F.3d at 1081. It follows that his 1991 Washington assault is not a violent felony for purposes of the ACCA.

1998 Washington Assault

During 1998, the defendant was convicted by a Washington jury of third degree assault.<sup>3</sup> The judge sentenced him to term of incarceration that fell below the standard range. In order to justify an exceptional sentence, the judge entered written findings and conclusions. Among other things, he said that "this was a relatively insignificant assault, that the law enforcement officer was not injured, did not lose his balance, nor fall from the assault." This is the only statement in the record that describes the defendant's conduct. Assuming that *Sandoval* applies in this context (i.e., that the record must show that the defendant employed substantial physical force or created a serious risk of physical injury), his 1998 third degree assault conviction is not a violent felony under the ACCA.<sup>4</sup>

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<sup>3</sup> The government did not submit a copy of the instructions that the judge gave to the jury.

<sup>4</sup> This is a close call. The judge's findings indicate that the defendant committed a battery. *State v. Hall*, 104 Wn. App. 56, 62, 14 P.3d 884 (2000). A strong argument can be made that a person who commits a battery while resisting arrest, even a battery that does not involve substantial physical force, creates a serious risk that the conflict will escalate and that someone will be injured. Cf.

*Appendix F*2000 Washington Felony Harassment

During 2000, the defendant entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to a felony charge of harassment. RCW 9A.46.020. The penalties for the crime of harassment are set forth in RCW 9A.46.020(2). Although criminal harassment ordinarily is a gross misdemeanor, RCW 9A.46.020(2)(a), it becomes a Class C felony in certain circumstances. RCW 9A.46.020(2)(b). In analyzing the state-court record, the Court begins with the Judgment, because it specifies the crime of which the defendant stands convicted. If the Judgment stated that the defendant's conviction was a Class C felony by virtue of RCW 9A.46.020(2)(b)(ii), the Court could state categorically that the defendant's harassment conviction is a violent felony. *Cf. United States v. Ladwig*, 432 F.3d 1001, 1004 (9th Cir.2005) ("Because all conduct that R.C.W. § 9.61.230(3)(b) treats as a felony is conduct that qualifies as a violent felony under the ACCA, a felony conviction under this provision qualifies as a violent felony under the categorical approach."). However, the Judgment does not cite RCW 9A.46.020(2)(b)(ii). It cites RCW 9A.46.020(1)(a), which can be a felony without being a violent felony.<sup>6</sup> Nevertheless, under the modified categorical approach, the Court finds that the defendant necessarily pleaded

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*Estrada-Rodriguez v. Mukasey*, No. 06-75064, 2007 WL 4554053 (9th Cir. Dec. 28, 2007) (holding that Arizona resisting arrest statute was an aggravated felony under 8 U.S.C. § 1101(a)(43)(F)).

<sup>6</sup> For example, a person is guilty of felony harassment if he knowingly threatens, without lawful authority, to cause physical damage to the property of another, RCW 9A.46.020(1)(a)(1)(ii), and he has a prior harassment conviction, RCW 9A.46.020(2)(b)(i).



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guilty to a violent felony. The Information charged the defendant with threatening to kill a judge. By admitting that allegation in the context of pleading guilty to a Class C felony, he necessarily admitted that he violated RCW 9A.46.020(1)(a)(i) and that he was subject to punishment under RCW 9A.46.020(2)(b)(ii). The latter requires proof that the harasser unlawfully threatened to kill the victim. Thus, the defendant's harassment conviction qualifies as a violent felony under the ACCA. 18 U.S.C. § 924(e)(2)(B)(i) ("threatened use of physical force against the person of another").

### OFFENSE LEVEL/CRIMINAL HISTORY CATEGORY

The defendant's offense level is 33, U.S.S.G. § 4B1.4(b)(3)(B), and his criminal history category is IV, §§ 4A1.1, 4A1.2, unless he used the firearm in connection with a crime of violence. In that case, his offense level is 34, § 4B1.4(b)(3)(A), and his criminal history category is VI, § 4B1.4(c)(2). The Court must determine whether this enhancement applies. *United States v. Ingham*, 486 F.3d 1068, 1076 (9th Cir. 2007). Since the enhancement would dramatically increase the guideline range, the Court assumes that clear and convincing evidence is required. *See id.* The term "crime of violence" is defined by U.S.S.G. § 4B1.2(a). In determining whether the defendant used the firearm in connection with a crime of violence, the Court has considered the information that is contained in paragraphs 13-15, 21, and 22 of the Presentence Investigation Report in light of the evidence that was presented during the pretrial evidentiary hearings and

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the defendant's trial. Having done so, the Court finds that, on March 25, 2005, the defendant brandished and fired the handgun in order to threaten the use of physical force against at least one of the men who was present at 409 Oren-Rice Road. By doing so, he used the handgun in connection with a crime of violence.<sup>6</sup>

**ACCEPTANCE OF RESPONSIBILITY**

The defendant seeks a two-level reduction of his offense level for acceptance of responsibility. U.S.S.G. § 3E1.1(a). It is true that, during the course of the trial, he admitted that he had been convicted of a felony prior to March 25, 2005. However, he required the government to prove beyond a reasonable doubt that he knowingly possessed a firearm and/or ammunition that had been shipped or transported from one state to another. These are essential elements of 18 U.S.C. § 922(g)(1). Although the defendant's decision to put the government to its burden of proof with respect to these elements does not automatically preclude a reduction for acceptance of responsibility, the Court concludes that this is not one of the rare cases in which the reduction is warranted. See U.S.S.G. § 3E1.1, comment. (n.2).

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<sup>6</sup> The fact that the defendant was not convicted of an assault is irrelevant. "[T]here is no requirement that the enhancement in § 4B1.4(b)(3)(A) be applied only when the defendant is charged with or convicted of a crime of violence." *United States v. Rockey*, 449 F.3d 1099, 1104 (10th Cir. 2006).

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**GUIDELINE RANGE**

The defendant's offense level is 34. He falls in criminal history category VI. As a result, his guideline range is 262-327 months of imprisonment.

**IT IS HEREBY ORDERED:**

1. Mr. Niesen's oral motion to withdraw as counsel of record is granted.
2. A Magistrate Judge shall appoint an attorney to represent the defendant on appeal.
3. The defendant's pro se motion to dismiss and his pro se petition for a writ of error coram nobis (Ct. Rec. 401) are denied.

**IT IS SO ORDERED.** The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

**DATED** this 9th day of January, 2008.

/s/ Fred Van Sickle  
Fred Van Sickle  
United States District Judge

**APPENDIX G — JUDGMENT AND SENTENCE,  
DIST. CT. DKT. NO. 407, FILED ON  
JANUARY 14TH, 2008**

**UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF WASHINGTON**

**JUDGMENT IN A CRIMINAL CASE**

Case Number: 2:05CR00104-001  
USM Number: 11175-085

**UNITED STATES OF AMERICA**

v.

**Matthew Robert Descamps**

Jeffrey S. Niesen  
Defendant's Attorney

**THE DEFENDANT:**

- ☐ Pleaded guilty to count(s) \_\_\_\_\_
- ☐ pleaded nolo contendere to count(s) \_\_\_\_\_  
which was accepted by the court.
- ☒ was found guilty on count(s) 1 \_\_\_\_\_  
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

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**Title and Section**  
18 U.S.C. § 922(g)(1)

**Nature of Offense**  
Felon in Possession of a  
Firearm and Ammunition

**Offense Ended**  
03/25/05

**Count**  
1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) \_\_\_\_\_

☐ Count(s) \_\_\_\_\_ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitutions, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/4/2008  
Date of Imposition of Judgment

/s/ FRED VAN SICKLE  
FRED VAN SICKLE  
Signature of Judge

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The Honorable Fred L. Van Sickle Judge, U.S. District Court  
Name and Title of Judge

[Jan. 12, 2008]

Date

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 262 month(s)

- ☒ The court makes the following recommendations to the Bureau of Prisons:

Credit for time served and that defendant be allowed to participate in any mental health counseling and treatment programs he may be eligible for and that he also be allowed to participate in any and all substance abuse treatment programs that may be applicable and that he may qualify for. Court will also recommend that defendant be designated to a BOP facility closest to Colville, Washington as possible.

- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:

☐ at \_\_\_\_\_ ☐ a.m. ☐ p.m. on \_\_\_\_\_

☐ as notified by the United States Marshal.

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- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on \_\_\_\_\_.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_.

at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 year(s)

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.



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The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in

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accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

**STANDARD CONDITIONS OF SUPERVISION**

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

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- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any control substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be

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occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

**SPECIAL CONDITIONS OF SUPERVISION**

While on supervised release, the defendant shall comply with the standard conditions of supervision adopted by this Court. Within 72 hours of release from the custody of the Bureau of Prisons the defendant shall report in person to the probation office in the district to which the defendant is released. The defendant shall comply with the following special conditions:

14. You shall complete a mental health evaluation and follow any treatment recommendations, including taking prescribed medications, as recommended by the treatment provider. You shall allow reciprocal release of information between the supervising probation officer and treatment provider. You shall contribute to the cost of treatment according to your ability.
15. You shall take medications as recommended and prescribed by the mental health treatment providers.
16. You shall submit your person, residence, office, or vehicle to a search, conducted by a U.S. probation officer, at a sensible time and manner, based upon reasonable suspicion of contraband or evidence of violation of a condition of supervision. Failure to submit to search may be grounds for revocation. You shall warn persons with

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whom you share a residence that the premises may be subject to search.

17. You shall undergo a substance abuse evaluation and, if indicated, enter into and successfully complete an approved substance abuse treatment program, including aftercare. You shall contribute to the cost of treatment according to your ability. You shall allow full reciprocal disclosure between the supervising probation officer and treatment provider.

18. You shall abstain from the use of illegal controlled substances, and shall submit to urinalysis testing, as directed by the supervising probation officer, but no more than six tests per month, in order to confirm continued abstinence from these substances.

19. You shall abstain from alcohol and shall submit to testing (including urinalysis and Breathalyzer), as directed by the supervising probation officer, but no more than six tests per month, in order to confirm continued abstinence from this substance.

### CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

|               | <u>Assessment</u> | <u>Fine</u> | <u>Restitution</u> |
|---------------|-------------------|-------------|--------------------|
| <b>TOTALS</b> | \$100.00          | \$0.00      | \$0.00             |

☐ The determination of restitution is deferred until \_\_\_\_\_ An Amended Judgment in a

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*Criminal Case* (AO 245C) will be entered after such determination.

- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee

Total Loss\*

Restitution Ordered

Priority or Percentage

TOTALS

\$           0.00

\$           0.00

\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.



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- ☐ Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☐ Lump sum payment of \$ \_\_\_\_\_ due immediately, balance due
- ☐ not later than \_\_\_\_\_, or
- ☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below;  
or



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- B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below;) or
- C ☐ Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

Defendant shall participate in the Inmate Financial Responsibility Program and shall contribute 25% of his monthly earnings while he is incarcerated.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal

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monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Numbers (including defendant number) and Defendant and Co-Defendant Names, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

**APPENDIX H — MEMORANDUM OF THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT, FILED JANUARY 10, 2012**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

No. 08-30013  
D.C. No. CR-05-00104-FVS

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MATTHEW ROBERT DESCAMPS,

Defendant-Appellant

**MEMORANDUM\***

Appeal from the United States District Court for the  
Eastern District of Washington, Fred L. Van Sickle,  
Senior District Judge, Presiding

---

\* This disposition is not appropriate for publication  
and is not precedent except as provided by Ninth Circuit Rule  
36-3.

*Appendix H*

Resubmitted January 10, 2012\*\*  
Seattle, Washington

Before: W. FLETCHER, GOULD, and TALLMAN,  
Circuit Judges.

Matthew Descamps was found guilty of being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). He had five previous felony convictions. The Armed Career Criminal Act (“ACCA”) requires a sentence of at least fifteen years if the defendant has three prior convictions for violent felonies. 18 U.S.C. § 924(e)(1). The statute defines a violent felony as “any crime punishable by imprisonment for a term exceeding one year . . . that has as an element the . . . threatened use of physical force against the person of another; or is burglary. . . .” § 924(e)(2). At sentencing, the district court concluded that Descamps had three predicate violent felonies—robbery, burglary, and felony harassment—and sentenced Descamps to 262 months in custody and five years of supervised release, under the ACCA. Descamps appeals his sentence.

Descamps first argues that all prior convictions that are used to enhance his sentence must be charged in the indictment and submitted to a jury for a finding beyond a reasonable doubt. The Supreme Court has held that prior convictions that increase a sentence beyond a statutory maximum do not have to be proven beyond

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\*\* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

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a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that any fact *other than the fact of a prior conviction* must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt); *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998) (prior convictions need not be presented in an indictment). Our circuit precedent follows the Supreme Court's precedent. *United States v. Grisel*, 488 F.3d 844, 846-47 (9th Cir. 2007) (stating that *Almendarez-Torres* is still good law and holding the ACCA does not require the government to plead and prove beyond a reasonable doubt a defendant's prior convictions).

Descamps also argues that his prior felonies of burglary and felony harassment do not qualify as violent felonies under the ACCA. Descamps pled guilty to the crime of burglary in violation of California Penal Code ("CPC") § 459. The generic definition of burglary is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). CPC § 459 defines burglary as when a "person . . . enters [various structures] . . . with intent to commit grand or petit larceny or any felony." Burglary under § 459 is categorically broader than generic burglary both because it includes burglary of a tent and because "California's definition of 'unlawful or unprivileged entry,' unlike the generic definition, permits a conviction for burglary of a structure open to the public and of a structure that the defendant is licensed or privileged to enter if the defendant enters the structure with the intent to commit a felony." *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 944 (9th Cir. 2011) (en banc).

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We therefore apply the modified categorical approach. *Id.* We look at the “statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. United States*, 544 U.S. 13, 16 (2005). The information charged that Descamps did “wilfully, unlawfully and feloniously enter a building, to-wit: CentroMart.” During the plea colloquy, the prosecutor said that the factual basis for the crime was the “breaking and entering of a grocery store.” Descamps made no objection to this statement of factual basis.

We hold that the guilty plea and conviction necessarily rested on facts that satisfy the elements of the generic definition of burglary. The charging document shows that Descamps pled guilty to entering a building, and the plea colloquy establishes that he did so in an unlawful way (by “breaking and entering”) in the generic sense. We reject as fanciful Descamps’s argument that “building” could have meant a tent. The combination of facts stated in the information and plea colloquy show that Descamps’s conviction necessarily rested on facts identifying the burglary as generic. *See Aguila-Montes*, 655 F.3d at 937.

We also reject Descamps’s claim that his Washington state conviction for felony harassment is not a violent felony. The amended information charged Descamps with knowingly threatening to kill a judge in violation of the Revised Code of Washington § 9A.46.020(1)(a). Descamps pled guilty. Descamps argues that a threat to kill does not necessarily have as an element a threatened use of



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physical force. We reject this argument. A finding that a person threatened to kill necessarily requires a finding of "threatened use of physical force against the person of another." § 924(e)(2)(ii).

The district court correctly held that Descamps had three prior violent felonies and correctly applied the ACCA to Descamps.<sup>1</sup>

**AFFIRMED.**

---

<sup>1</sup> Descamps has filed a supplemental brief with our permission in addition to those filed by his attorney. Construing the pleading liberally, Descamps has asserted a claim of ineffective assistance of counsel. But this type of claim is more properly raised by collateral attack under 28 U.S.C. § 2255, because in such a proceeding facts concerning the representation can be developed, and not on direct appeal, so we decline to address the claim. *United States v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1997).



# **PETITIONER'S BRIEF**

IN THE  
**Supreme Court of the United States**

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**MATTHEW ROBERT DESCAMPS,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

**BRIEF FOR PETITIONER**

---

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## QUESTION PRESENTED

The California burglary statute under which Mr. Descamps was convicted, California Penal Code § 459, is missing an element of generic burglary as defined for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e) – entry into a building need not be *unlawful*. The Ninth Circuit nevertheless concluded that Mr. Descamps was actually convicted of generic burglary, because the prosecutor alleged during a guilty-plea colloquy that he broke into a grocery store.

The question presented is:

Whether the Ninth Circuit's ruling in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*) – that a state conviction for burglary, where the statute is missing an element of the generic crime, may be subject to the modified categorical approach – is in error.

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## **OPINION BELOW**

The opinion of the United States Court of Appeals for the Ninth Circuit is reprinted in the Joint Appendix ("J.A.") at 70a-74a.

## **JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES**

The judgment and opinion of the court of appeals was entered on January 10, 2012. The petition for writ of certiorari was timely filed on March 19, 2012 and was granted on August 31, 2012. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Fifth Amendment to the United States Constitution is attached to this brief as Appendix A.

The Sixth Amendment to the United States Constitution is attached to this brief as Appendix B.

Section 922(g) of Title 18 of the United States Code (2005) is attached to this brief as Appendix C.

Section 924(a)(2) of Title 18 of the United States Code (2005) is attached to this brief as Appendix D.

Section 924(e) of Title 18 of the United States Code (2005) is attached to this brief as Appendix E.

Section 459 of the California Penal Code (1978) is attached to this brief as Appendix F.

## STATEMENT OF THE CASE

1. Matthew Descamps was convicted at a jury trial for possessing a firearm after being convicted of a felony, a violation of 18 U.S.C. § 922(g)(1)(2005). A § 922(g)(1) offense ordinarily carries a maximum sentence of ten years' imprisonment. 18 U.S.C. § 924(a)(2)(2005). Under the Armed Career Criminal Act ("ACCA"), the sentence increases to a minimum of fifteen years' imprisonment, with a maximum penalty of life in prison, if the Government shows that the defendant has been convicted three times previously "for a violent felony or a serious drug offense." 18 U.S.C. § 924(e) (2005). The Government alleged that Mr. Descamps had the convictions required to trigger the ACCA enhancement. J.A. 11a-13a.

The probation officer who prepared the presentence investigation report agreed. J.A. 76a, 98a, 131a. She identified five convictions believed to be violent felonies under the definition in § 924(e): a California robbery conviction, two Washington third-degree assault convictions, a Washington felony-harassment conviction, and a California burglary conviction. J.A. 96a, 98a, 102a, 106a, 97a. The probation officer recommended that the court apply the ACCA mandatory-minimum sentence and she calculated an advisory sentencing guidelines range of 262 to 325 months' imprisonment. J.A. 131a.

2. Mr. Descamps objected to the application of the ACCA. At sentencing, he argued that only his California robbery conviction was a conviction for a violent felony. The district court agreed with Mr. Descamps that his two Washington assault convictions were not violent felonies under the ACCA. J.A. 51a-52a. The court disagreed about



the felony-harassment conviction, however, ruling that it was a violent felony because the offense Mr. Descamps had admitted committing in his state guilty plea contained an element of the threatened use of force. J.A. 58a-54a. This ruling meant that Mr. Descamps had two prior convictions for violent felonies.

Whether Mr. Descamps had a third ACCA predicate turned on the effect of his California burglary conviction. An offense that "is burglary" is an enhancement-triggering violent felony. 18 U.S.C. § 924(e)(2)(B)(ii). But "burglary," under the ACCA, has a particular meaning. An offense "is burglary" if the conviction is for a crime, "regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990). The California burglary statute under which Mr. Descamps was convicted did not have, as an element, a requirement that entry be unlawful or unprivileged. See California Penal Code § 459 (1978). Mr. Descamps argued that, because the California statute lacked this element, a conviction under it was not a conviction for an offense that "is burglary."

3. The district court rejected Mr. Descamps's argument, ruling that it could look to the factual basis of the plea to determine whether the conduct at issue would qualify as a violent felony. J.A. 50a. The state record showed that the prosecution and the defense had agreed that a plea to the California burglary statute was factually supported. When the state judge asked what the basis "involve[d]," the prosecution offered a general description of the offense conduct: "This involves the breaking and



entering of a grocery store.” J.A. 25a. Mr. Descamps did not assent to this description – he remained silent – and the trial court never made findings that the offense in fact involved an unprivileged entry. The federal sentencing court found this factual basis to be proof that an unlawful entry had occurred, and thus, although unlawful entry was not an element of the offense of conviction, that Mr. Descamps’s prior conviction was for an offense that is burglary under the ACCA. J.A. 49a-50a. The court applied the ACCA and sentenced Mr. Descamps to 262 months’ imprisonment. J.A. 59a.

4. Mr. Descamps appealed. He argued, among other things, that the California burglary statute does not include the element of entering or remaining unlawfully and therefore is not “burglary” within the meaning of the ACCA. The Ninth Circuit affirmed the sentence, relying on its recently issued decision in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*) (“*Aguila-Montes*”). J.A. 72a-73a. *Aguila-Montes*, by a 6-5 vote of the *en banc* court, declared that sentencing courts, when considering a statute that is altogether missing an element of a generic offense, may look to any facts of the prior offense set forth in the documents approved for consultation by this Court in *Taylor and Shepard v. United States*, 544 U.S. 13 (2005). *Aguila-Montes*, 655 F.3d at 940. Because the Ninth Circuit read the factual basis of Mr. Descamps’s plea as showing an unlawful entry, it held that this never-assented-to admission is sufficient to make the offense “burglary” for ACCA purposes. J.A. 73a.

5. This Court granted certiorari to consider whether, when a statute of prior conviction lacks an element of generic burglary, a federal court may imply that element from the facts surrounding the conviction.

## SUMMARY OF ARGUMENT

1. The Armed Career Criminal Act, 18 U.S.C § 924(e), provides for enhanced sentences for persons convicted of gun possession who have three previous convictions for violent felonies. The statute defines the term “violent felony” as including any offense that “is burglary.” Years ago, questions arose as to what that phrase means and how courts should apply the statute. This Court settled both questions in *Taylor v. United States*, 495 U.S. 575 (1990). An offense “is burglary” if the defendant’s conviction is for a crime, “regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” *Id.* at 599. The Court concluded that this essential definition of burglary captures the generic, contemporary meaning of the offense and that it is consistent with the definition of burglary stated in a prior iteration of the ACCA.

The *Taylor* Court also explained how a federal sentencing court is to determine whether a state offense “is burglary.” It summarily rejected the idea that the state label for an offense controls. State labels, the Court explained, often stretch an offense far beyond its common understanding. The Court specifically noted that the offense that California denominates as burglary is an example of a crime labeled “burglary” that is not “burglary” in the ACCA’s generic sense. Because state labels do not control, because Congress’s intent was to capture the ordinary offense of burglary, and because § 924(e)’s text requires “convictions . . . for a [burglary],” the Court held that § 924(e) compels an elements-based “categorical approach” to determining whether a statute of conviction qualifies as burglary. This categorical

approach “look[s] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.” 495 U.S. at 600.

The *Taylor* Court made clear that the statutory elements of the prior offense control, not the facts underlying that offense. Thus, in a state that defines burglary in alternative ways, a federal sentencing court may look to see whether the fact-finder was “actually required” to find facts establishing the elements of generic burglary. The *Taylor* Court explained that, in determining what element related facts were “actually required” to be found, the federal sentencing court could look to the particular statutory charge and to the particular jury instructions setting forth the statutory elements required to be proved.

2. Looking to the elements actually required to be found under the statute in the particular case has come to be known as the “modified categorical approach.” The modified nature of analysis does not alter the fundamental inquiry – whether a defendant was convicted of an offense comprising all the elements of generic burglary. The “modification” addresses only whether a particular statute of conviction must be considered as a whole, or whether a federal sentencing court may conduct a closer examination when the statute sets forth alternative elements, some of which constitute generic burglary and some of which do not. After *Taylor*, the Court has repeatedly affirmed that the categorical approach, while allowing consideration of more than just the statute as a whole, is limited to examination of the elements required to be proven under the statute and their correspondence to the generic offense at issue. See *Shepard v. United States*, 544 U.S. 13 (2005);

*James v. United States*, 550 U.S. 192 (2007); *Chambers v. United States*, 555 U.S. 122 (2009).

3. The California offense of which Mr. Descamps was convicted is missing altogether the generic element of unlawful or unprivileged entry into, or remaining in, a building. It is therefore not, under either the categorical or modified categorical approach, the generic offense of burglary that the ACCA means to capture. The court of appeals nonetheless held that Mr. Descamps's prior offense could be deemed burglary under the ACCA. It could be so deemed, the court reasoned, because the prosecutor's factual assertion in support of the plea included a statement that Mr. Descamps's conduct involved breaking and entering a building.

The Ninth Circuit's ruling runs contrary to this Court's teachings. The ACCA, in defining burglary in a way mandating the categorical approach, requires the examination of elements, not of conduct in a particular case. The ACCA is intended to identify those prior convictions that are violent and worthy of subjecting a defendant to an enhanced punishment for later gun possession, and it does that by examining the elements of a defendant's prior convictions. This approach, based on the text of the statute and its focus on the fact of "conviction," requires that the conviction be for a generic offense. This categorical approach is rooted both in the constitution and in the reality of day-to-day criminal practice.

The elements-based, categorical approach asks the federal sentencing court to make only a legal interpretation – whether a prior conviction legally constitutes what Congress has designated "burglary." That approach is



fully consistent with the requirements of the Fifth and Sixth Amendment that facts that raise a defendant's maximum sentence be proved to the fact-finder beyond a reasonable doubt, or admitted by the defendant as a fact necessary to the offense of conviction. The Ninth Circuit's approach allows a federal court to make findings about a prior offense, findings that were not necessarily made by the convicting court. These findings raise the maximum sentence, for the federal offense – in the case of a § 922(g) violation from ten years' imprisonment to at least fifteen years' imprisonment with a maximum penalty of life in prison. The Ninth Circuit's supply-the-missing-element approach therefore raises serious constitutional doubt.

The Ninth Circuit's approach also ignores the reality of the criminal justice system. Matters that are not elements – matters that do not make one guilty or not guilty of a statutory offense, matters that do not affect punishment – are matters that the accused has no incentive to dispute, no matter how inaccurate they may be. In fact, disputing them may earn enmity from the prosecutor or the sentencing judge and thus adversely affect the plea bargain the accused has reached or the sentence he hopes to receive. Thus, an accused's failure to challenge such "facts" says little about whether they are true.

*Taylor* settled the inquiry into what constitutes "burglary" for ACCA purposes. *Taylor* rested on the text of the ACCA, the intent of Congress, the practicalities of the criminal justice system, and the demands of the Constitution. None of those things have changed in the twenty-plus years since *Taylor* was decided. The Ninth Circuit erred and should be reversed.

## ARGUMENT

- I. For more than twenty years, the Court has mandated a categorical approach in determining whether a prior conviction qualifies as an ACCA predicate – an approach dictated by the statute's text, its legislative history, and the need to avoid significant constitutional and practical problems.

The principle animating the Court's decision in *Taylor v. United States*, 495 U.S. 575 (1990), was the recognition that the 1986 version of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), maintains the legislation's focus on the elements of a prior offense, rather than on the conduct underlying a prior conviction or on the label that a State attaches to a particular conviction. *See id.* at 588-89, 600-01. The Court held that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States." *Id.* at 598. The Court explained that the "generic sense" it identified is defined by the elements of the defendant's prior conviction:

We conclude that a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, *having the basic elements* of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.

*Id.* at 598, 599 (emphasis added). Thus, under the ACCA, whether a prior conviction "is burglary" is defined by its elements.

In light of that conclusion, the Court adopted a “formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.” *Id.* at 600; accord *Shepard v. United States*, 544 U.S. 13, 19 (2005) (noting that, in “imposing the categorical approach,” section 924(e) “refers to predicate offenses in terms not of prior conduct but of prior ‘convictions’ and the ‘element[s]’ of crimes”). The Court emphasized the element-based nature of the inquiry in both its illustration of the rule and its restatement of it:

For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that *the jury necessarily had to find* an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

*Taylor*, 495 U.S. at 602 (emphasis added); see also *id.* (permitting a finding that a prior conviction “is burglary” where “the charging paper and *jury instructions actually required the jury to find* all the elements of generic burglary in order to convict the defendant.”) (emphasis added).

This approach is entirely consistent with Congress’s use of the term “burglary” in its “generic sense.” Indeed, the *Taylor* Court buttressed its conclusion with four points, each of which illustrates why an elements-based analysis is essential. First, the Court observed, the



statutory language suggests that Congress envisioned that sentencing courts would examine judgments arising from prior *convictions* rather than undertake elaborate factual inquiries into past criminal *conduct*:

[T]he language of § 924(e) generally supports the inference that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions. Section 924(e)(1) refers to “a person who ... has three previous convictions” for – not a person who has committed – three previous violent felonies or drug offenses.

*Id.* at 600; *see also id.* (The ACCA defines “violent felony” as any crime punishable by imprisonment for more than a year that ‘has as an element’ – not any crime that, in a particular case, involves – the use or threat of force.”) (emphasis added). This “context” demonstrates that “the phrase ‘is burglary’ in § 924(e)(2)(B)(ii) most likely refers to the elements of the statute of conviction, not to the facts of each defendant’s conduct.” *Id.* at 600-01.<sup>1</sup>

Second, “the legislative history of the [ACCA] shows that Congress generally took a categorical approach to predicate offenses.” *Id.* at 601. Despite “considerable”

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1. Congress certainly knows how to indicate when it intends district courts to focus on conduct and not convictions. *See, e.g.*, 18 U.S.C. § 4247(a)(5) (2012) (defining a “sexually dangerous person” as one “who has *engaged or attempted to engage* in sexually violent conduct or child molestation and who is sexually dangerous to others.” (emphasis added)).

congressional debate over the “kinds of offenses” and their definitions, “no one suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case.” *Id.* Had Congress “meant to adopt an approach that would require the sentencing court to engage in an elaborate factfinding process regarding the defendant’s prior offenses, surely this would have been mentioned somewhere in the legislative history.” *Id.*<sup>2</sup>

Third, the Court observed that “the practical difficulties and potential unfairness of a factual approach are daunting.” *Id.* at 601. Deviating from a categorical approach would lead to mini-trials, and might mean allowing the government and defense to present witnesses before the sentencing court regarding the conduct at issue in the predicate offense. *Id.* The Court was also troubled by the unfairness of punishing a defendant for a prior burglary when “a guilty plea to a lesser, *nonburglary* offense was the result of a plea bargain.” *Id.* at 601-02 (emphasis added).

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2. Indeed, in connection with its effort “to determine the meaning of the word ‘burglary’ as it is used in [the 1986 amendments to the ACCA],” *see Taylor*, 495 U.S. at 577, the Court analyzed the 1986 Act’s predecessor statutes, concluding that the ACCA’s “enhancement provision always has embodied a categorical approach to the designation of predicate offenses.” *Id.* at 588. In the 1984 predecessor statute, the terms “‘robbery’ and ‘burglary’ were defined in the statute itself, not left to the vagaries of state law.” *Id.* The Court therefore concluded that “Congress intended that the enhancement provision be triggered by *crimes having certain specified elements*, not by crimes that happened to be labeled ‘robbery’ or ‘burglary’ by the laws of the State of conviction.” *Id.* at 588-89 (emphasis added).

The Court had a fourth concern about a fact-based approach – whether it would raise constitutional problems. Although *Taylor* pre-dated the Court's decisions in *Jones v. United States*, 526 U.S. 227 (1999) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court went on to question whether a fact-based approach would survive Sixth Amendment scrutiny: "If the sentencing court were to conclude, from its own review of the record that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?" *Taylor*, 495 U.S. at 601. As the principles established by *Jones* and *Apprendi* took hold, the avoidance of this serious constitutional doubt has been repeated in this Court's reaffirmations of the categorical approach. See, e.g., *Shepard v. United States*, 544 U.S. 18, 24 (2005) (*Jones* and *Apprendi* provide "a further reason to adhere" to *Taylor*'s "demanding requirement"); *James v. United States*, 550 U.S. 192, 214 (2007) (holding that because, in determining whether attempted burglary qualified as a violent felony under the residual clause, "the Court is engaging in statutory interpretation, not judicial factfinding", thereby "avoid[ing] any inquiry into the underlying facts of James' particular offense", that analysis "raise[d] no Sixth Amendment issue").

Each of the concerns expressed by the *Taylor* Court are ameliorated by respecting the congressional selection of an elements-based analysis: "the only plausible interpretation of § 924(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense." *Id.* Because the categorical approach is consistent with the language of the statute and resolves broad institutional and constitutional worries

about judicial factfinding, the Court has never deviated from *Taylor's* conclusion that Congress chose an elements-based analysis in enacting section 924(e). *See, e.g., James v. United States*, 550 U.S. 192, 202 (2007) (“[W]e consider whether the *elements of the offense* are of the type that would justify its inclusion within [ACCA’s] residual provision, without inquiring into the specific conduct of the particular offender.”) (emphasis in original); *Begay v. United States*, 553 U.S. 137, 141 (2008) (“[W]e consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.”). As the Court said in *Chambers v. United States*, 555 U.S. 122, 125 (2009):

The statute’s defining language, read naturally, uses “felony” to refer to a crime as generally committed. And by so construing the statute, one avoids the practical difficulty of trying to ascertain at sentencing, perhaps from a paper record mentioning only a guilty plea, whether the present defendant’s prior crime, as committed on a particular occasion, did or did not involve violent behavior.

**II. The modified categorical approach is a limited variant of the categorical approach, and remains focused on the elements of the prior offense rather than on the conduct underlying that offense.**

The elements-based inquiry adopted in *Taylor* has a limited proviso. As the Court acknowledged, “[the] categorical approach ... may permit the sentencing court to go beyond the mere fact of conviction in a narrow



range of cases where a jury was actually required to find all the elements of generic burglary.” *Taylor*, 495 U.S. at 602. But even this slight deviation – applicable only in a “narrow range of cases” – from a “pure” categorical approach applies only when the fact in question possesses the defining attribute of an element: it is an irreducible requirement for conviction. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (“a criminal defendant [is entitled] to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’”). As a consequence, the fact at issue must be one that the fact-finder is “*actually required to find.*” *Taylor*, 495 U.S. at 602 (emphasis added).

Given the Court’s recognition that the ACCA’s generic categories of crimes are addressed to “the elements of the statute of conviction, not to the facts of each defendant’s conduct,” *see id.* at 600-01, it is not surprising that any variation from the pure categorical approach would retain the focus on elements: a variant that relied upon the facts of a defendant’s conduct would hardly shed light on a generic offense that Congress defined by way of elements, not facts, and would raise anew all of the concerns addressed in *Taylor*.

The Court has maintained the distinction between elements and conduct in its post-*Taylor* cases applying the modified categorical approach. *Shepard*, which discussed the modified categorical approach in the context of prior convictions secured by guilty pleas, repeatedly emphasized the elements-based nature of the facts to which *Taylor* may be applied. *See Shepard*, 544 U.S. at 17 (emphasizing that *Taylor* applied to facts the jury was “actually required to find”); *id.* at 21 (identifying materials from which “a later

court could generally tell whether the plea had ‘necessarily’ rested on the fact identifying the burglary as generic.”); *id.* at 24 (maintaining “the demanding requirement that any sentence under the ACCA rest on a showing that a prior conviction ‘necessarily’ involved (and a prior plea necessarily admitted) facts equating to generic burglary”) (plurality opinion); *see also Nijhawan v. Holder*, 557 U.S. 29, 85 (2009) (categorical approach “required the court to ‘examine, not the unsuccessful burglary the defendant attempted on a particular occasion, but the generic crime of attempted burglary’”) (quoting *Chambers v. United States*, 555 U.S. 122, 125 (2009)).

Thus, the modified categorical approach, like the categorical approach itself, is focused on the elements of the prior statute of conviction, not on the conduct underlying the conviction. That is compelled by the very same considerations underlying the categorical approach – the text of the ACCA, its legislative history, and the need to avoid significant practical and constitutional problems associated with a conduct-based approach.

### **III. The modified categorical approach does not apply to statutes altogether missing an element of a generic offense.**

As the Court recognized in *Taylor*, many statutes contain alternative elements that define different offenses within the same provision. When presented with such a statute, *Taylor* authorizes sentencing courts to look beyond the prior judgment to documents that establish which of the alternate offenses the defendant committed. But neither the history of the ACCA nor this Court’s consistent application of the modified categorical

approach authorizes courts to do what the Ninth Circuit has permitted here – resorting to factual allegations that were not necessary to conviction under the statute at issue in order to determine whether, regardless of the actual elements of the offense of conviction, the defendant *could have* been convicted of the generic version of the same crime, and thus is subject to the ACCA’s increased penalty.

- A. **Not applying the modified categorical approach to missing-element statutes comports with the ACCA’s text and history, and with this Court’s consistent application of the approach in only a “narrow range” of cases.**

Contravening twenty years of emphasis this Court has placed on rare application and elements of offenses, the Ninth Circuit has taken a different view of when and how to resort to the modified categorical approach: always, and by looking at the facts underlying the prosecution’s theory of the case. *See United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*). Under *Aguila-Montes*, courts in every case are directed to ask “what facts the conviction ‘necessarily rested’ on in light of the theory of the case as revealed in the relevant *Shepard* documents, and whether these facts satisfy the elements of the generic offense.” 655 F.3d at 937. This analysis applies “even if [the relevant] fact is not separately listed as a statutory element of the [prior] crime.” *Id.* at 938. Because this approach cannot be squared with the text or history of the ACCA, or this Court’s precedent, it must be rejected.



1. The text and history of the ACCA require rejection of the Ninth Circuit's approach.

The Ninth Circuit's approach cannot be reconciled with *Taylor's* holding that section 924(e)'s "phrase 'is burglary' ... most likely refers to the elements of the statute of conviction, not to the facts of each defendant's conduct." 495 U.S. at 600-01. Nor can it be reconciled with *Taylor's* recognition that "no one [in Congress] suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case." *Id.* at 601. Indeed, the Ninth Circuit has achieved precisely that result: the conviction under California Penal Code § 459 in *Aguila-Montes* was not "burglary" under the ACCA, *see* 655 F.3d at 946, while Mr. Descamps's identical conviction *was*. J.A. 73a.

That outcome is impermissible under *Taylor*. The Court has described the modified categorical approach as designed with the purpose of differentiating among differing sets of elements contained within a single statutory provision. *See Nijhawan*, 557 U.S. at 41 (observing that the Court's "cases that developed the evidentiary list [of court records that may be consulted], developed that list for a very different purpose, namely that of determining which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction");<sup>3</sup> accord

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3. The petitioner in *Nijhawan* sought the protection of *Taylor's* categorical approach – specifically its limited factual inquiry – with respect to a fact that did not go to an offense element. The Court rejected that approach, *see* 557 U.S. at 41, but also went on to observe that "petitioner's proposal itself can prove impractical insofar as it requires obtaining from a jury a special verdict on a fact that ... is not an element of the offense." *Id.* at

*Johnson v. United States*, 130 S. Ct. 1265, 1273 (2010) (the modified categorical approach “permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record”).<sup>4</sup> It is not intended as a way to decide whether conduct satisfies the requirements on an uncharged offense. In short, there is no room for the Ninth Circuit’s case-by-case inquiry into whether non-elemental facts satisfy the generic crime’s elements. See *United States v. Beardsley*, 691 F.3d 252, 270-71 (2d Cir. 2012) (“An approach that simply asks whether the conduct underlying the conviction, as disclosed in the charging instruments or the plea colloquy or the jury instructions, is the sort of conduct referenced in the sentence enhancement, is not a *modified* categorical approach; it is not ‘categorical’ at all.”) (emphasis in original).

2. This Court has endorsed the use of the modified categorical approach only for statutes that have alternative elements, some of which constitute the generic offense and some of which do not.

This Court has never approved of the modified categorical approach for statutes that are altogether

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42. Under the Ninth Circuit’s view, that “impractical” proposal is already the law: *Aguila-Montes* permits the consideration of facts that do not go to offense elements, and does so without even requiring a “special verdict” on such facts. See 655 F.3d at 938.

4. A strong majority of the lower courts have adopted *Nijhawan*’s and *Johnson*’s view regarding the scope of the applicability of the modified categorical approach. See, e.g., *United States v. Beardsley*, 691 F.3d 252, 264-267, 269-74 (2d Cir. 2012) (following *Nijhawan* and *Johnson* and collecting cases); accord *United States v. Gomez*, 690 F.3d 194, 200 (4th Cir. 2012).

missing elements necessary to constitute a generic offense. Rather, in a steady series of decisions, the Court has endorsed the modified categorical approach only in cases involving statutes that have alternative elements – some of which constitute the generic offense at issue and some of which do not.

***Taylor***: To begin with, at issue in *Taylor* was whether the defendant's prior Missouri convictions for second-degree burglary qualified as generic burglaries under the ACCA. Taylor's burglary convictions in Missouri were in 1968 and 1971. *Taylor*, 495 U.S. at 578 n.1. At that time, Missouri had seven different second-degree burglary statutes. *Id.* As the *Taylor* Court noted, one of these statutes had alternative elements – some of which satisfied the ACCA definition of generic burglary and some of which did not. *Id.* at 578 n.1, 599, 602. Specifically, the statute prohibited breaking and entering a "building" as well as "any booth or tent, or any boat, or vessel or railroad car." *Id.* at 578 n.1, 599 (quoting Mo. Rev. Stat § 560.070 (1969)). Although unlawful entry into a "building" constitutes a generic burglary, unlawful entry into "any boat, or vessel, or railroad car" does not. *Taylor*, 495 U.S. 598-99.

The Court indicated that this is exactly the type of alternative-elements statute that should be subject to the modified categorical approach. Indeed, the Court explained that it is in these "narrow range of cases" where the modified categorical approach will permit the federal sentencing court to look to a limited universe of documents to determine whether the "jury was actually required to find all the *elements* of generic burglary." *Id.* at 602 (emphasis added). As the Court further elaborated:

For example, in a State whose burglary statutes include entry of an *automobile* as well as a *building*, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

*Id.* (emphasis added).

In *Taylor*, the “sparse” record from the prior Missouri cases failed to indicate under which of the seven Missouri statutes the defendant was convicted – let alone whether he was convicted of the particular statute with alternative elements. *Id.* at 602. Thus, the Court had no need to apply the modified categorical approach to determine whether *Taylor* was necessarily convicted of the element of “building” versus the elements of “any boat, or vessel, or railroad car.” Nonetheless, the Court’s discussion of the modified categorical approach makes plain that the Court endorsed its use for statutes that include both elements that constitute an ACCA “violent felony” and elements that do not.

***Shepard*:** The Court next addressed the modified categorical approach in *Shepard v. United States*, 544 U.S. 13 (2005). At issue there was whether the defendant’s Massachusetts burglary convictions were generic burglaries under the ACCA. *Id.* at 17. The Massachusetts statute had alternative elements, some which mirrored the ACCA generic burglary definition and some of which did not. The statute prohibited unlawful entry into a



*building* with intent to commit a crime (which is a generic burglary) and unlawful entry into *cars and boats* with intent to commit a crime (which is not a generic burglary). *Id.* Because the statute had elements of both generic and non-generic burglary, the Court held that a federal sentencing court could apply the modified categorical approach and look to *Shepard*-authorized documents to determine whether the defendant necessarily admitted elements of the generic offense. *Id.* at 21.

***Chambers:*** This Court again indicated that the modified categorical approach applies to statutes that have alternative elements, some of which constitute a “violent felony” and some of which did not, in *Chambers v. United States*, 555 U.S. 122 (2009). In *Chambers*, at issue was whether a prior conviction under an Illinois escape statute constituted a “violent felony” under the residual clause of the ACCA. *Id.* at 126. This clause provides that a prior offense is a “violent felony” if it “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). Under this inquiry, the prior statute of conviction must have elements that criminalize “purposeful, violent, and aggressive” actions similar in kind to the enumerated offenses preceding the residual clause. *Begay*, 553 U.S. at 145.

The Illinois escape statute had some elements that satisfied this definition and some that did not. Specifically, the Court in *Chambers* ruled that the parts of the statute that criminalized “[1] failing to report to a penal institution, [2] failing to report for periodic imprisonment, [3] failing to return from furlough, [4] failing to return from work and day release, and [5] failing to abide by the terms of home confinement” were not “violent felonies” under the residual clause, but the Court suggested that

the parts of the statute that criminalized “escape from the custody of an employee of a penal institution” and “escape from a penal institution” were “violent felonies.” *Chambers*, 555 U.S. at 126-30.

Because the statute had these alternative violent and non-violent elements, the Court likened the Illinois statute to the Massachusetts burglary statute in *Shepard* and applied the modified categorical approach by looking to the charging document of the prior case. *Id.* at 126. The charging document reflected that the defendant was convicted of failing to report for periodic imprisonment to a county jail – a part of the statute that did not have the elements constituting a “violent felony.” *Id.* Thus, the Court ruled that the prior conviction was not a “violent felony.” *Id.* at 127-30.

***Nijhawan*:** In this case, the Court addressed whether the defendant’s prior conviction for the crimes of fraud and deceit constituted an “aggravated felony” under an immigration statute that qualified him for deportation. *Nijhawan*, 557 U.S. at 33. The term “aggravated felony” includes “an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000.” 8 U.S.C. § 1101(a)(48)(M)(i) (2009) (emphasis added). The Court held that in determining whether the loss to the victim exceeded \$10,000, a federal sentencing court was not limited by the categorical approach at all. *Nijhawan*, 557 U.S. at 36. Specifically, the Court held that Congress did not intend for the \$10,000 amount to refer to an element of the fraud or deceit crime. Rather it refers to the particular circumstances in which an offender committed a more broadly defined fraud or deceit crime on a particular occasion. *Id.* at 40.



In so holding, however, the Court strongly suggested that when Congress intends for the categorical framework to apply to a sentencing enhancement, like the ACCA, courts may resort to the modified categorical approach only when the prior offense has some elements that constitute a “violent felony” as well as some elements that do not. The Court emphasized that, under the dictates of *Taylor* and *Shepard*, a federal sentencing court can review a limited list of documents from the prior cases for the purpose of “determining which *statutory phrase* (contained within a statutory provision that covers several different generic crimes) covered a prior conviction.” *Id.* at 41 (emphasis added).

In illustrating this point, the Court discussed the Massachusetts burglary statute at issue in *Shepard*, which had alternative statutory phrases that enumerated elements constituting both a violent and non-violent felony under the ACCA:

A single Massachusetts statute section entitled “Breaking and Entering at Night,” for example, criminalizes breaking into a “*building, ship, vessel, or vehicle*.” Mass. Gen. Laws, ch. 266 § 16 (West 2006). In such an instance, we have said, a court must determine whether an offender’s prior conviction was for the violent, rather than the nonviolent, break-ins that this single five-word phrase describes (*e.g.*, breaking into a *building* rather than into a *vessel*), by examining the “indictment or information and jury instructions,” *Taylor, supra*, at 602, 110 S. Ct. 2148, or, if a guilty plea is at issue, by examining the plea agreement, plea colloquy

or “some comparable judicial record” of the factual basis for the plea. *Shepard v. United States*, 544 U.S. 18, 26, 125 S. Ct. 1254, 161 L. Ed.2d 205 (2005).”

*Nijhawan*, 557 U.S. at 35 (emphasis added). Because statutory phrases within a statute delineate elements of an offense, the Court’s discussion makes it evident that the modified categorical approach applies when a statute has alternative elements, some of which constitute a “violent felony” and some of which do not.

**Johnson:** Finally, in *Johnson v. United States*, 130 S. Ct. 1265 (2010), the Court again applied the modified categorical approach to an ACCA sentence – this time to decide whether a prior Florida battery conviction was a “violent felony” under the “force” clause of the statute. See 18 U.S.C. § 924(e)(2)(B)(i) (violent felony includes offenses that have an element of “physical force against the person of another”). “Physical force” means “*violent* force – that is force capable of causing physical pain or injury to another person.” *Johnson*, 130 S. Ct. at 1271 (emphasis in original). The Florida battery statute had alternative elements, some of which satisfied this definition and some of which did not. One part of the statute criminalized intentional striking of another (which had an element of “violent force”) while another part prohibited the actual or intentional touching of another (which did not). *Id.* at 1269.

The Court reiterated that the modified categorical approach was appropriate under these circumstances. Specifically, the Court provided that the modified categorical approach is available “[w]hen the law under which [a] defendant has been convicted contains *statutory*

*phrases that cover several different generic crimes, some of which require violent force and some of which do not,” and that in such cases the modified categorical approach “permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record...” Id. at 1273 (emphasis added).<sup>5</sup>*

Unlike the statutes at issue in *Taylor*, *Shepard*, *Chambers*, and *Johnson*, the California burglary statute at issue here is altogether missing the element of “unlawful or unprivileged entry” necessary to constitute a generic burglary under the ACCA. Therefore, it can never qualify as a “violent felony” under the ACCA. This result is dictated not only by this Court’s past application of the modified categorical approach only to statutes with alternative violent and non-violent elements, but also by the rationale underlying this limitation. See *supra* Part III.A.1.

**3. Application of the modified categorical approach to a missing-element statute makes it applicable in all cases, not a “narrow range of cases.”**

As discussed above, this Court has repeatedly cautioned that federal sentencing courts are to resort to the modified categorical approach only in a “narrow range of cases.” *Taylor*, 495 U.S. at 602; *Shepard*, 544 U.S. at 17 (quoting *Taylor*). Yet, under the Ninth Circuit’s approach

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5. The majority of the federal courts of appeals have interpreted this Court’s precedent to hold that federal sentencing courts can only use the modified categorical approach where the statute sets forth alternative violent and non-violent elements. See *Beardsley*, 691 F.3d at 265 nn.2-3 (collecting cases).

– always applying the modified categorical approach to look for facts in *Shepard*-approved documents suggesting that a defendant *could have* been convicted of a generic offense, even though he was actually convicted only of a nongeneric offense because the statute of conviction is missing an element of the generic offense – the modified categorical approach will become the norm rather than the exception.

Countless statutes are missing ACCA “violent felony” elements. Under the Ninth Circuit’s expansive view, convictions for typical non-violent offenses such as theft, shoplifting, trespassing, and destruction of property would all be subject to the modified categorical approach because there is always a possibility that they may be coupled with a “violent” act as defined under the ACCA.

For example, assume that a defendant is charged with a felony shoplifting offense that merely requires the elements of intentionally stealing items worth more than \$500 from a store. It is conceivable that in the course of stealing merchandise from a department store, an individual could kick a store clerk in the leg – conduct that constitutes “violent force” under the ACCA.<sup>6</sup> A charging document could allege such behavior, even though kicking is a fact that does not go to an element of the offense and that is not necessary for a jury to find (or for the defendant to admit) in order to be convicted of shoplifting.

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6. One way in which a prior offense can qualify as a “violent felony” under the ACCA is if it has an element “the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). “Physical force” means “violent force – that is force capable of causing physical pain or injury to another person.” See *Johnson, supra*, 130 S. Ct. at 1271.



Yet, if a federal sentencing court may use the modified categorical approach when a “violent felony” element is missing altogether from the prior statute of conviction, and may consider this non-element fact, then a conviction for something as minor as shoplifting could become a basis for a mandatory fifteen-year sentence under the ACCA.<sup>7</sup>

Further, as the Second Circuit explained in *United States v. Beardsley*, 691 F.3d 252, 272 (2d Cir. 2012), a non-element modified categorical approach would not be “consistent with the clear import of the Supreme Court’s instructions in *Taylor*, *Shepard*, and other cases,” which require a two-step process: “first, a sentencing court is to determine whether the statute of prior conviction is the sort that permits looking beyond a [strict] categorical analysis of the elements of the state offense; second if it is, the court is permitted to look to some, but not other, sources to determine the actual basis of the conviction.” *Id.* But under a modified categorical approach not driven by elements, “the first step would be eliminated: in all cases in which the conviction is under a broadly worded statute and thus *might* be based on conduct that would trigger the federal sentencing enhancement, the court

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7. The same is true for a felony trespassing conviction. Assume that such trespassing was solely defined as an unprivileged entry into a building. A defendant is charged with this offense, but, nonetheless, the charging document also alleged the additional fact that the defendant entered the building *with an intent to commit a crime*. Although this additional fact combined with trespassing constitutes a generic burglary and qualifies as a “violent felony” under the ACCA, the additional fact is not necessary to satisfy the elements of a trespassing conviction. Yet, under a non-elemental modified categorical approach, trespassing could also serve as a basis for a mandatory fifteen-year sentence.

would look beyond the offense of conviction and review additional documents.” *Id.* (emphasis in original). “There [is] nothing in such an approach that can fairly be described as ‘categorical’ – ‘modified’ or otherwise.” *Id.* Instead, under this approach, “whenever a defendant has a prior conviction for violating a broad statute” that “*could conceivably cover conduct* that matches the enhancement’s terms,” a federal sentencing court could look beyond the elements of the offense and assess the defendant’s alleged behavior as referenced in the records of the prior case. *Id.* (emphasis added).<sup>8</sup>

This view turns the modified categorical approach on its head and expands it far beyond the narrow circumstances intended by this Court. The Court should adhere to the limited view of the modified categorical approach established in *Taylor* and the view that has been consistently reaffirmed over twenty years – a view that permits federal sentencing courts to look at *Shepard* approved documents only in the “narrow range of cases” where the elements of conviction are not clear from the face of the statute.

**B. Applying the modified categorical approach to a missing-element statute would raise serious constitutional doubts.**

*Shepard*’s recognition that *Apprendi* provides “a further reason to adhere” to the “demanding requirement”

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8. Under the proposed expansion of the modified categorical approach, only in cases where the defendant has fewer than three felony convictions could a sentencing court be satisfied, without any further examination, that the ACCA does not apply.



of the categorical approach counsels strongly against applying the modified categorical approach to statutes altogether missing an element of the generic offense. *Shepard*, 544 U.S. at 24.

When possible, courts interpret statutes in a manner that does not “raise[] serious constitutional doubts.” *Clark v. Suarez Martinez*, 543 U.S. 371, 381 (2005). Expanding the modified categorical approach to encompass missing-element statutes would raise just such doubts. Judicial fact-finding at sentencing that increases the maximum penalty for a crime violates the Fifth and Sixth Amendments. *Jones v. United States*, 526 U.S. 227, 248 & n.6 (1999). The Court has recently granted certiorari to decide whether the rule of *Apprendi* applies to facts necessary to impose a mandatory-minimum sentence, as well. *See Alleyne v. United States*, No. 11-9385, 2012 WL 894630 (October 5, 2012).

The prior-conviction exception to *Apprendi* has been tolerated in large part because “a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.” *Jones*, 526 U.S. at 249; *see also Apprendi*, 530 U.S. at 496 (noting the enhanced “validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt”). Yet those safeguards – including the requirement of a unanimous jury finding – are simply absent for facts not necessary to the conviction. *See Richardson v. United States*, 526 U.S. 813, 817 (1999) (“[A] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element,

say, which of several possible means the defendant used to commit an element of the crime.”); *see also Aguila-Montes*, 655 F.3d at 956 n.14 (Berzon, J., concurring) (“State juries need not agree on non-element facts.”) (citing *Schad v. Arizona*, 501 U.S. 624, 681-82 (1991), and *Schad*, 501 U.S. at 649 (Scalia, J., concurring)). Indeed, the law has long recognized that surplus allegations in a charging document, which are not necessary to sustain a conviction, need not be proven and are not put in issue by a plea of not guilty.<sup>9</sup> Therefore, if a federal court were to rely upon such surplus allegations in deciding that a prior conviction was a violent felony, it would be engaging in impermissible fact-finding under the Sixth Amendment.

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9. Factual and legal errors involving superfluous allegations in an indictment, plea agreement, or jury instruction have often been dismissed by courts as harmless or non-erroneous altogether. *See, e.g., United States v. Miller*, 471 U.S. 130, 144 (1985) (holding that “allegations that are unnecessary to an offense” alleged in an indictment do not have legal effect and that removal of those allegations does not constitute an amendment of that indictment); *State v. Corhen*, 306 Ga. App. 495, 499 (Ga. Ct. App. 2010) (language in indictment that does not relate to “[t]he material facts which constitute the offense charged” are surplusage “and may be disregarded in evidence.”); *People v. Ross*, 917 N.E.2d 1111 (Ill. App. Ct. 2009) (noting no legal error in amending the indictment’s allegations about how the defendant committed the crime because “amendments changing the manner in which the defendant committed the offense are formal, not substantive”); *Johnson v. State*, 460 So. 2d 244, 247 (Ala. 1984) (“As long as the remaining portions of the indictment validly charge a crime, the existence of surplusage in the indictment will not affect the validity of a conviction.” (internal quotation omitted)). *State v. Hooker*, 59 S.E. 866 (N.C. 1907) (“The addition in the indictment of the words ‘with intent to commit larceny’ was surplusage; hence unnecessary to be proven, and any proof offered of intent to steal was merely irrelevant and harmless.”).

To avoid these constitutional concerns, the Court should eschew reliance upon surplus allegations in a charging document to determine the nature of a prior conviction. Instead, the Court should continue to permit application of the modified categorical approach in a “narrow range of cases.” As currently applied, the modified categorical approach does not implicate *Apprendi*, as limited by the prior-conviction exception announced in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Sentencing courts make a legal determination regarding whether a given statute of conviction contains alternative elements so as to constitute multiple crimes. *See, e.g., Chambers*, 555 U.S. at 126-27 (examining the language of the statute at issue, as well as the authorized penalties, to conclude that the statute “contain[s] at least two separate crimes”). Only upon finding that a particular statute may be violated in multiple ways, some of which would qualify as federal predicate conviction and some which would not, may a sentencing court turn to examine the relevant *Shepard*-approved documents. And, even then, this examination results in no factual findings about the defendant’s actual conduct.

In other words, the modified categorical approach is “used only to determine *which* crime within a statute the defendant committed, not *how* he committed that crime.” *United States v. Woods*, 576 F.3d 400, 405 (7th Cir. 2009). Because of that limitation, the modified categorical approach avoids the type of judicial fact-finding barred by the Fifth and Sixth Amendments. *See Taylor*, 495 U.S. at 602.

The approach adopted by the Ninth Circuit, in contrast, requires sentencing courts to examine *Shepard*

documents to determine how the defendant committed the crime – as the court put it, to determine “what facts the conviction ‘necessarily rested’ on in light of the theory of the case.” *Aguila-Montes*, 655 F.3d at 937. Applying the ACCA in such a manner forces courts to rely on the actual conduct as charged or as otherwise described in *Shepard*-approved documents – a result clearly at odds with the constitutional underpinning of the categorical approach, as articulated in *Taylor* and *Shepard*. Tethering the modified categorical approach to the elements of a prior conviction ensures that sentencing courts engage in purely legal inquiries and do not come close to violating the Fifth and Sixth Amendments. Expanding it into a free-standing obligation of sentencing courts to inquire into every silent space in the statute of prior conviction runs headlong into serious and doubtful questions under *Apprendi*.

- C. Applying the modified categorical approach to a missing-element statute would be profoundly unfair in light of reliability and reliance concerns, and would cause practical problems in identifying ACCA predicates.

Abandoning an elements-focused inquiry not only transgresses the textual and constitutional basis for the categorical approach, it also creates a host of practical and fairness problems. By changing the focus of the inquiry from elements to facts (even to facts contained in the *Shepard*-approved documents), the Ninth Circuit’s approach makes fifteen-year mandatory minimum sentences turn on factual assertions whose reliability is deeply suspect for at least two reasons: the defendant had no incentive to contest assertions that have no legal relevance to his conviction, and the defendant is given no



procedural protections for such collateral fact-finding. Moreover, the Ninth Circuit's approach makes it impossible to determine categorically in advance which crimes will be violent felonies, because all such determinations would be made case-by-case at sentencing.<sup>10</sup>

Element-based factual allegations contained in *Shepard* documents can be deemed reliable because the defendant has every incentive to contest or disprove them: in their absence, he cannot be convicted at all. Moreover, the defendant has all of the procedural rights and safeguards, provided by the Constitution and statute, attendant to facts underlying elements of the offense.

In contrast, collateral historical facts – or, more precisely, factual allegations – about an offense that are unmoored from the elements necessary to secure a conviction lack even minimal guarantees of trustworthiness, regardless of whether or not they make it into a *Shepard*-approved document. A defendant has no practical reason or incentive to contest facts legally irrelevant to conviction – in fact, he often has a *disincentive* to quibble about such facts. Consider a case in which a defendant pleads guilty to a clearly non-violent offense (say, felony trespassing), but appears to have admitted or acceded to a particular fact in a *Shepard*-approved document that would qualify the offense as a violent felony (say, burglary). The defendant's failure to challenge this "fact" tells us little about whether or not it is true. His complaisance may have been born

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10. The *Taylor* Court anticipated precisely the Ninth Circuit's approach – requiring a federal sentencing court retrospectively to piece together the prosecution's theory of the case in the prior conviction – as a potential source of "practical difficulties and potential unfairness." See *Taylor*, 495 U.S. at 601.

of a desire to maintain goodwill with the court, or to not frustrate a plea agreement with the government, or to eschew contesting non-essential facts and arguing about things that ultimately do not matter.<sup>11</sup>

Sentencing courts should not impose a fifteen-year mandatory minimum sentence based on old factual allegations that had no legal import at the time they were made, that defendants had no incentive to challenge, and that were never subject to the procedural safeguards for fact-finding that is actually material to a conviction. Such records are not “records of the convicting court approaching the certainty of the record of conviction.” *Shepard*, 544 U.S. at 23.

Aside from resting on unreliable factual allegations, the Ninth Circuit approach upsets the legitimate reliance interests of defendants. In effect, defendants are made subject to federal enhancements based on ACCA “violent felony” offenses of which they were not convicted. In the context of a guilty plea, the non-element approach would greatly disrespect the terms of the state plea bargain under which the parties agreed to guilt on a non-violent offense rather than an offense that constitutes a “violent felony” under the ACCA. In *Taylor*, the Court explicitly warned against this result with the following example:

Even if the Government were able to prove  
[non-elemental facts reflected in documents

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11. Even assuming a hypothetical defendant *did* want to contest such a fact, he would have little practical means of doing so, short of going to trial for the quixotic purpose of litigating a fact that simply did not matter to his guilt or innocence.



from the prior case], if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary.

495 U.S. at 601-02. In the context of a jury trial, a non-elemental approach would likewise lead to an unfair result because the federal sentencing enhancement would be based on facts that the jury was not required to find.

The Ninth Circuit has blessed this result in part on the misguided view that it promotes “uniformity” in the application of the ACCA. See *Aguila-Montes*, 655 F.3d at 938-40. But this Court has consistently rejected entreaties for “a wider evidentiary cast” to serve purported interests of uniformity. See, *Shepard*, 544 U.S. at 21-22. Attempts to expand the categorical approach in the name of uniformity are simply “call[s] to ease away from the *Taylor* conclusion, that respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State.” *Id.* at 23.

Statutes that are altogether missing an element of the generic offense will *never* contain all the elements of a violent felony. Thus, if the element-based approach is abandoned and a factual approach prevails, sentencing courts and litigants in missing-element cases will be faced with an infinite number of potential ways of violating the same statute – some of which will be considered “violent felonies” and some of which will not, depending not on any statutory definition of the offense but on the individual factual allegations that happen to be contained in the

*Shepard*-approved documents. Expanding the modified categorical approach to missing-element statutes not only sacrifices the “categorical” inquiry, it also introduces uncertainty and the practical problems associated with case-specific relitigation.

**IV. The Ninth Circuit’s treatment of Mr. Descamps’s prior conviction for California burglary demonstrates the impropriety of applying the modified categorical approach to missing-element statutes.**

Mr. Descamps’s case demonstrates that the Ninth Circuit has abandoned both Congress’s choice of an element-based, generic-offense approach and the Court’s *Taylor* jurisprudence. While *Taylor* defines generic burglary as requiring an unprivileged entry as an element, see 495 U.S. at 598 & n.8,<sup>12</sup> California Penal Code § 459, the statute under which Mr. Descamps was convicted, does not: even an entry with consent suffices. See, e.g., *People v. Frye*, 18 Cal. 4th 894, 954 (1998), *overruled on other grounds by People v. Doolin*, 45 Cal. 4th 390, 421 n.22 (2009); accord *United States v. Huizar*, 688 F.3d 1193, 1194 (10th Cir. 2012) (section 459 does not “require proof that the defendant’s entry was unlawful or unprivileged: in California, one can burgle a place after being invited in”); *Aguila-Montes*, 655 F.3d at 944 (same);<sup>13</sup> *United States*

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12. See also *United States v. Huizar*, 688 F.3d 1193, 1194 (10th Cir. 2012) (holding that *Taylor* requires an unprivileged entry); *Aguila-Montes*, 655 F.3d at 943–44 (same); *United States v. Ortega-Gonzaga*, 490 F.3d 398, 394–95 (5th Cir. 2007) (same).

13. This portion of Judge Bybee’s *Aguila-Montes* opinion was joined by Judge Berzon’s concurrence. See 655 F.3d at 978–74 (Berzon, J., concurring).

*v. Gonzalez-Terrazas*, 529 F.3d 293, 298 (5th Cir. 2008) (same).

Because a defendant can be convicted of burglary “even though express or implied permission has been given to him personally or as a member of the public,” *People v. Deptula*, 58 Cal. 2d 225, 228 (1962), no California judge accepting a plea of guilty and no California jury trying a case is ever required to find a *Taylor* non-consensual entry.<sup>14</sup> And certainly no California criminal defendant would offer consent to enter as a defense in light of the California Supreme Court’s express rejection of that “defense.” *See Frye*, 18 Cal. 4th at 954-55.

The modified categorical approach, however, applies only “in a narrow range of cases where a jury was actually required to find all the elements of generic burglary.” *Taylor*, 495 U.S. at 602. *Shepard* applies the same standard to guilty pleas. *See Shepard*, 544 U.S. at 21. A California Penal Code § 459 conviction, which never “actually requires” an unprivileged entry, simply cannot meet that standard.

In Mr. Descamps’s case, after both the defense and the prosecution agreed that there was a factual basis for his guilty plea, J.A. 24a-25a, the trial court asked, “In substance, what does this involve?” J.A. 25a. In response, the prosecution offered a general description of the offense conduct: “This involves the breaking and entering of a

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14. The California pattern jury instructions do not require an unprivileged entry. *See* Judicial Council of Cal. Crim. Jury Instructions 1700 (2012).

grocery store.” J.A. 25a.<sup>15</sup> Mr. Descamps did not assent to this description – he remained silent<sup>16</sup> – and the trial court never made findings that the offense in fact involved an unprivileged entry. But even if the trial court had made such a finding, it would not have been “actually required” to do so, *see Shepard*, 544 U.S. at 17, nor would that finding have gone to an element, as required by 18 U.S.C. § 924(e). *See id.* at 19 (section 924(e) “refers to predicate offenses in terms not of prior conduct but of prior ‘convictions’ and the ‘element[s]’ of crimes.”). Rather, it would simply have gone to Mr. Descamps’s “prior conduct,” which is of no moment under the ACCA. *See id.*

Similarly, Mr. Descamps’s criminal information contains the word “unlawfully” and his plea colloquy indicated that his offense was a “breaking and entering” –

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15. The informal description omitted the mens rea element of generic burglary. *See Taylor*, 495 U.S. at 599.

16. Presumably the Court of Appeals inferred Mr. Descamps’s assent to a (sub silentio) judicial finding that he broke into the grocery store from his silence in the wake of the prosecutor’s statement. Such an inference would seem to present a factual question inasmuch as the admission-by-silence doctrine normally requires a factual inquiry into whether “the nature of the statement is such that it normally would induce the party to respond....” *See, e.g., United States v. Duval*, 496 F.3d 64, 76 (1st Cir. 2007). The nature of the statement here was that it was made in connection with a guilty plea indicating that Mr. Descamps was not challenging the elements of the California burglary charge. Because he was pleading guilty, it is hard to imagine what incentive he might have had to dispute a superfluous allegation, informally made. Indeed, he might have had disincentives, such as a fear that his plea bargain might be withdrawn before it was accepted by the trial court due to his perceived intransigence. At any rate, this is a factual question that the court of appeals simply glossed over.



facts that, if necessary to his conviction, would satisfy the unprivileged element of generic burglary under *Taylor*.<sup>17</sup> However, these allegations were of no moment to the outcome of the California prosecution.<sup>18</sup> They were, in fact, superfluous and, only now, years later, is the government attempting to elevate them to some critical relevance.

Applying the modified categorical approach in this case required the sentencing court to hold that legally superfluous factual allegations in state records – namely, that Mr. Descamps “broke and entered” the CentroMart – nonetheless satisfied the unprivileged element of *Taylor*’s generic definition of burglary. That is impermissible for all of the reasons set forth in Part III, *supra*.

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17. As relevant here, California Penal Code Section 459 provides that a “person who enters [various structures] with intent to commit grand or petit larceny or any felony is guilty of burglary.” The criminal information alleged that Petitioner did “wilfully, unlawfully and feloniously enter a building, to-wit: CentroMart, located at 2850 North California, in the City of Stockton, with the intent to commit theft therein,” J.A. 14a-15a, and there is an indication at Petitioner’s plea colloquy that the offense “involve[d] the breaking and entering of a grocery store.” J.A. at 25a.

18. In fact, interpreting the word choice of “unlawfully” in the instant criminal information to mean “unlawfully” in the sense contemplated by *Taylor* in its generic burglary definition may not even accurately capture the definition of the word intended by its drafter, as the fact that Petitioner “unlawfully” entered the CentroMart could simply have been a reference to an unlawful intent once therein. See, e.g., *People v. Birks*, 19 Cal. 4th 108, 118 & n.8 (1998) (observing that “burglary, the entry of specified places with the intent to steal or commit a felony ... can be perpetrated without committing any form of criminal trespass,” and that an information using the “did willfully and unlawfully enter” language did not “necessarily include criminal trespass”).

**CONCLUSION**

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed, and the case remanded to the court of appeals with instructions to remand to the district court for resentencing.

Respectfully submitted,

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## **APPENDIX**

**APPENDIX A — U.S. CONSTITUTION,  
AMENDMENT V**

**The Fifth Amendment to the United States  
Constitution provides in relevant part:**

**No person shall be ... deprived of life, liberty,  
or property, without due process of law.**

**APPENDIX B — U.S. CONSTITUTION,  
AMENDMENT VI**

**The Sixth Amendment to the United States  
Constitution provides in relevant part:**

**In all criminal prosecutions, the accused shall  
enjoy the right to a speedy and public trial,  
by an impartial jury of the State and district  
wherein the crime shall have been committed;  
which district shall have been previously  
ascertained by law, and to be informed of the  
nature and cause of the accusation.**

**APPENDIX C — 18 U.S.C. § 922(g)**

Section 922(g) of Title 18 of the United States Code provides in relevant part:

**It shall be unlawful for any person ... who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.**

**APPENDIX D — 18 U.S.C. § 924(a)(2)**

**Section 924(a)(2) of Title 18 of the United States Code provides in relevant part:**

**Whoever knowingly violates subsection ... (g) ... of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.**

**APPENDIX E — 18 U.S.C. § 922(e)**

Section 924(e) of Title 18 of the United States Code provides in relevant part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection - ...

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, ... that -

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.



**APPENDIX F — CAL. PENAL CODE § 459**

Section 459 of the California Penal Code (1978) provides in relevant part:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, floating home, ...railroad car,, trailer coach,... any house car, ... inhabited camper, ... vehicle ... when the doors are locked, aircraft ..., or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this section, "inhabited" means currently being used for dwelling purposes, whether occupied or not.

# **RESPONDENT'S BRIEF**

**In the Supreme Court of the United States**

---

MATTHEW ROBERT DESCAMPS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

BRIEF FOR THE UNITED STATES

---

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## QUESTION PRESENTED

Whether the modified categorical approach can be used to decide whether petitioner's previous conviction for burglary under California Penal Code § 459 (West Supp. 1978) qualifies as a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), when Section 459 encompasses both offenses that are generic burglary under *Taylor v. United States*, 495 U.S. 575 (1990), as well as offenses that are not.



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# In the Supreme Court of the United States

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No. 11-9540

MATTHEW ROBERT DESCAMPS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The memorandum opinion of the court of appeals (J.A. 70a-74a) is not published in the *Federal Reporter*, but is reprinted at 466 Fed. Appx. 563. The findings and conclusions of the district court at sentencing (J.A. 47a-56a) are unpublished.

### JURISDICTION

The judgment of the court of appeals was entered on January 12, 2012. The petition for a writ of certiorari was filed on March 19, 2012. The petition for a writ of certiorari was granted on August 31, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at Pet. Br. App. 1a-5a. Section 459 of the

California Penal Code (as effective on January 1, 1978) provides:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this section, "inhabited" means currently being used for dwelling purposes, whether occupied or not.

1977 Cal. Stat. 2220.<sup>1</sup>

#### STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Washington, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to 262 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. J.A. 70a-74a.

1. On March 25, 2005, the Stevens County, Washington, Sheriff's Office received a 911 call reporting that petitioner had fired a handgun at another person.

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<sup>1</sup> As relevant to the authorities cited in this brief, the version of California Penal Code § 459 enacted in 1977 and effective January 1, 1978, is materially identical to prior and subsequent versions of that statute.

Presentence Investigation Report (PSR) ¶ 13, J.A. 81a. Police responded and saw petitioner driving from the scene. After a chase, petitioner, carrying a black coat, ran from his vehicle into a bus that was being used as a residence. Petitioner emerged from the bus about ten seconds later, without the coat. Petitioner was arrested. PSR ¶ 14, J.A. 81a-82a. Several witnesses told the police that petitioner had fired a gun into the radiator of a truck in which another person, Ken McCrady, was sitting. PSR ¶ 15, J.A. 82a. A search of the bus found, inside the coat petitioner had carried into the bus, a .32 caliber handgun loaded with one fired casing and four live rounds, along with additional rounds of ammunition. *Ibid.* When petitioner was transferred to the Stevens County Jail, a jailer found another .32 round in petitioner's pants pocket. PSR ¶ 16, J.A. 82a. After being advised of his rights, petitioner admitted that McCrady owed him \$700 for methamphetamine, that he had drawn the handgun to frighten McCrady, and that he had fired the gun. PSR ¶¶ 19-21, J.A. 83a-84a.

2. On May 10, 2005, a grand jury in the Eastern District of Washington charged petitioner with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924. On December 19, 2005, the United States filed an information alleging that petitioner had five prior violent felony convictions and therefore qualified as an armed career criminal under 18 U.S.C. 924(e). The information listed a 1977 California first degree robbery offense, a 1978 California burglary offense, two Washington third-degree assault offenses (one from 1991 and one from 1998), and a 2000 Washington offense for felony harassment with threat to kill. J.A. 11a-13a. Following a jury trial, peti-

tioner was convicted of the felon-in-possession offense. J.A. 1a, 57a-58a.

3. The PSR recommended that petitioner be sentenced under the ACCA, which, as relevant here, provides for an increased sentence for a person who violates 18 U.S.C. 922(g) and "has three previous convictions \* \* \* for a violent felony." 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as

any crime punishable by imprisonment for a term exceeding one year \* \* \* that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The PSR determined that petitioner had at least three previous convictions that qualified as violent felonies, including the robbery, burglary, and felony-harassment convictions. PSR ¶¶ 52, 66, 71, 103, J.A. 92a-93a, 96a, 97a, 106a.<sup>2</sup>

The PSR determined that because petitioner was subject to the ACCA and had used his firearm "in connection with either a crime of violence \* \* \* or a controlled substance offense," Sentencing Guidelines

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<sup>2</sup> The PSR also classified petitioner's third-degree assault offenses as violent felonies, PSR ¶¶ 44, 52, 75, 89, J.A. 91a-92a, 92a-93a, 98a, 102a, but the district court concluded otherwise, J.A. 34a-36a, 51a-52a. The government did not offer as a violent felony petitioner's 1997 Washington fourth-degree assault conviction, which arose from petitioner's drunken beating of his 13-year-old son. See PSR ¶¶ 86-88, J.A. 101a-102a.

§ 4B1.4(b)(3)(A), his total offense level was 34 and his criminal history category was VI, resulting in an advisory sentencing guidelines range of 262 to 327 months of imprisonment. PSR ¶¶ 52, 124, 178, J.A. 92a-93a, 112a-113a, 131a; see Sentencing Guidelines § 4B1.4(a), (b)(3)(A) and (c)(2). Under the ACCA, petitioner was subject to a mandatory minimum sentence of 15 years of imprisonment. PSR ¶ 177, J.A. 131a; see 18 U.S.C. 924(e)(1).

At sentencing, petitioner acknowledged that his robbery conviction was for a violent felony. Sent. Tr. 27. Petitioner disputed, however, that his burglary and felony-harassment convictions were for violent felonies. *Id.* at 27-31. With respect to the burglary conviction, petitioner conceded that “clearly a modified categorical approach” should be applied, but pointed out that at the plea colloquy in the prior case, petitioner had admitted only to “a breaking and entering” without specifically stating his intent to commit a felony. *Id.* at 28. The government responded that the charging document in the burglary case specified that petitioner “willfully and unlawfully enter[ed] into \* \* \* CentroMart with the intent to commit theft therein” and that the court could consider the charging document in conjunction with the plea colloquy to determine that the California burglary offense was an ACCA predicate. *Id.* at 56.

With respect to the felony-harassment conviction, petitioner’s counsel asserted that petitioner’s threat to kill a judge “[wa]s just simple talk, just simple words” and that “there[] [was] sufficient question as to whether or not simply the statement, with obviously the inability to do anything [to carry out the threat]” qualified as a violent felony. Sent. Tr. 30-31.



4. The district court determined both on the record and in written findings and conclusions that petitioner's robbery, burglary, and felony-harassment convictions were for violent felonies. J.A. 32a-34a, 36a-38a, 47a-50a, 53a-54a. The district court agreed with petitioner's concession that his robbery conviction was a violent felony. J.A. 32a, 48a-49a.

With respect to petitioner's burglary conviction, the court accepted the government's concession that "the definition of the term 'burglary' in [California Penal Code] § 459 is broader than the generic definition" of "burglary" in the ACCA that this Court announced in *Taylor v. United States*, 495 U.S. 575 (1990). J.A. 49a. The court therefore agreed with the parties that it should use the "modified categorical approach and look at the documents" detailing petitioner's conviction, J.A. 33a, as permitted by *Shepard v. United States*, 544 U.S. 13 (2005), see J.A. 50a. The district court considered both the charging document and petitioner's plea colloquy, explaining:

The Information charged the defendant with unlawfully entering a building, which it described as "CentroMart," with "the intent to commit theft therein." During the change-of-plea hearing, the prosecutor stated that the crime "involve[d] the breaking and entering of a grocery store." Read together, these statements demonstrate that the defendant necessarily admitted the elements of a generic burglary.

*Ibid.* (brackets in original; footnote omitted); see J.A. 33a-34a (stating that the court was "satisfied that the documentation in this matter does show that" petitioner's burglary conviction was for generic burglary "under the modified categorical approach").



Likewise, the district court looked at the amended criminal information for petitioner's prior felony harassment conviction, which charged that petitioner "did knowingly threaten to kill Judge Philip J. Van de Veer," J.A. 37a, and concluded that the conviction on that charge "qualifies as a violent felony" under ACCA because it involved the "threatened use of physical force against the person of another." J.A. 54a (quoting 18 U.S.C. 924(e)(2)(B)(i)); see J.A. 36a-37a.

Because the district court concluded that petitioner had three previous convictions for violent felonies, it agreed with the PSR's Sentencing Guidelines computation and the PSR's determination that petitioner should be sentenced under the ACCA. The court sentenced petitioner to 262 months of imprisonment, to be followed by five years of supervised release. J.A. 59a-60a.

5. The court of appeals affirmed in an unpublished memorandum opinion. J.A. 70a-74a. As relevant here, petitioner conceded that "the court may use the modified categorical approach to determine whether \* \* \* [he] was convicted of the generic crime of burglary," and argued only that the record of his California burglary conviction "does not unequivocally establish that [he] was convicted of the generic crime of burglary." Pet. C.A. Br. 45-46. In particular, petitioner argued that, although the criminal information alleged that he had entered a building "with intent to commit a theft," his plea colloquy explicitly noted only that he had broken and entered into a grocery store, and had not specifically stated that he had "the requisite 'generic' intent." *Id.* at 46.

The court of appeals concluded that petitioner's California burglary conviction qualified as a violent felony. J.A. 72a-73a. Under *Taylor*, the court explained, "[t]he

generic definition of burglary is ‘an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.’” J.A. 72a (quoting *Taylor*, 495 U.S. at 598). The court of appeals recognized that California Penal Code § 459 is “broader than generic burglary” in two respects. *Ibid.* First, Section 459 encompasses entries into places other than a building or other structure, such as “a tent.” *Ibid.* Second, Section 459 “permits a conviction for burglary of a structure open to the public and of a structure that the defendant is licensed or privileged to enter if the defendant enters the structure with the intent to commit a felony.” *Ibid.* (quoting *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 944 (9th Cir. 2011) (en banc) (opinion of Bybee, J.)).

Because the California statute at issue encompassed both generic burglary and offenses that are not generic burglary, the court of appeals “appl[ied] the modified categorical approach” by “look[ing] at the ‘statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.’” J.A. 73a (quoting *Shepard*, 544 U.S. at 16). Based on the charging document and plea colloquy, the court of appeals “h[e]ld that the guilty plea and conviction necessarily rested on facts that satisfy the generic definition of burglary.” *Ibid.* With respect to the “building” element of generic burglary, the criminal information alleged that petitioner had entered “a building, to-wit: CentroMart,” and during the plea colloquy, petitioner had not objected to the categorization of CentroMart as “a grocery store.” *Ibid.* With respect to the “unlawful” entry element of generic burglary, “the plea colloquy establishe[d] that [petitioner had entered the building]

in an unlawful way (by ‘breaking and entering’) in the generic sense.” *Ibid.* Accordingly, the court concluded, “[petitioner’s] conviction necessarily rested on facts identifying the burglary as generic.” *Ibid.*

### SUMMARY OF ARGUMENT

Under the modified categorical approach, petitioner’s conviction for burglary under California Penal Code § 459 qualifies as a violent felony under the ACCA.

A. The ACCA defines a “violent felony” to include the generic crime of “burglary,” which *Taylor v. United States*, 495 U.S. 575 (1990), interpreted to mean a crime “having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” *Id.* at 599. When the state statute underlying a defendant’s previous conviction is coextensive with or narrower than generic burglary, the previous conviction categorically qualifies as a violent felony. But when the state statute is broader than generic burglary—*i.e.*, when some (but not all) of the offenses that qualify as the state crime qualify as generic burglary—this Court has recognized a modified categorical approach that asks whether, in connection with the previous conviction, “a jury was actually required to find all the elements of generic burglary,” *id.* at 602, or whether “a plea of guilty to [an offense] defined by a nongeneric statute necessarily admitted elements of the generic offense,” *Shepard v. United States*, 544 U.S. 13, 26 (2005).

Petitioner contends (Pet. Br. 19-26) that the modified categorical approach can be applied only to statutes of conviction that—unlike the statute of petitioner’s previous conviction, Cal. Penal Code § 459—are textually divisible into separate provisions, some of which categorically qualify as the generic crime. Although this

Court has occasionally illustrated the modified categorical approach with such statutes, nothing in this Court's precedent limits the modified categorical approach to such statutes. Nor would a divisible-statute limitation have a sound basis in principle: Sometimes the crimes embraced by a statute are broken into separate textual phrases, but often judicial decisions articulating the elements of common law crimes or interpreting statutory text will clarify that some (but not all) of the offenses that qualify as the state crime also qualify as a violent felony under the ACCA. Those judicial decisions are as much a part of state law as the text of the state statute. Because the ACCA focuses on the special danger presented when repeat violent offenders possess guns, and not on how a State chooses to announce its criminal law, accepting petitioner's limitation would result in arbitrary and unwarranted sentencing disparities among offenders whose past criminal conduct is indistinguishable.

In practice, the modified categorical approach applies in the same manner whenever the state crime is broader than the generic crime: An ACCA sentencing court looks to a limited set of *Shepard*-approved records of the previous conviction to ascertain whether a jury was actually required to find, or the defendant entering a guilty plea necessarily admitted, the elements of the generic crime. That analysis examines the circumstances of a previous conviction only to undertake a legal inquiry into the basis for the previous conviction. It does not entail a free-ranging inquiry into the factual circumstances of the prior crime. That process protects defendants' rights and satisfies "*Taylor's* demand for certainty when identifying a generic offense," *Shepard*, 544 U.S. at 21.



Applying the modified categorical approach in that fashion resolves petitioner's central concern about "missing" elements: that a court will resort to fact-finding to fill in the missing element. If the crime of which a defendant was previously convicted is truly "missing altogether" an element corresponding to an element of the generic crime, then the defendant cannot have "necessarily admitted" the generic element, because it had no relevance to the previous conviction—whether or not the factual record might support finding such an element. When the modified categorical approach is properly defined and applied based on *Shepard*-approved records, convictions under statutes that are truly missing elements will not qualify, and petitioner's constitutional and practical concerns about supposed judicial fact-finding have no force.

B. As applied to this case, petitioner's principal argument is that his California burglary conviction cannot qualify as generic burglary because California Penal Code § 459 is "missing altogether," Pet. Br. 7, generic burglary's element of unlawfulness of entry. The premise of petitioner's argument is faulty. The Supreme Court of California's controlling interpretation of Section 459 is that "burglary [requires] an entry which invades a possessory right in a building." *People v. Gauze*, 542 P.2d 1365, 1367 (1975). That requirement corresponds to (but is broader than) generic burglary's element of unlawfulness of entry. Because the California element is broader than the generic element, the modified categorical approach can be used to determine whether a particular defendant's conviction under Section 459 was for generic burglary.

C. Applying the modified categorical approach, petitioner's conviction under California Penal Code § 459

was for generic burglary because petitioner's guilty plea—which *Shepard* records show was based on offense conduct of “breaking and entering of a grocery store,” J.A. 25a—necessarily admitted the elements of generic burglary.

### ARGUMENT

#### **PETITIONER'S CONVICTION UNDER CALIFORNIA PENAL CODE § 459 WAS FOR GENERIC BURGLARY**

Petitioner contends that California Penal Code § 459 is “missing altogether,” Pet. Br. 7, an element of generic burglary, and, therefore, convictions under that statute can never qualify as generic burglary under *Taylor v. United States*, 495 U.S. 575 (1990). Petitioner also insists (Pet. Br. 19-26) that the modified categorical approach can be applied only to statutes of conviction that, unlike Section 459, explicitly separate the broader state crime into textually separate provisions, some of which categorically qualify as the generic crime. Petitioner's contentions are incorrect: The modified categorical approach is not confined to explicitly divisible statutes, but is instead applicable to statutes of all forms that include (but are broader than) generic offenses. And properly understood, California Penal Code § 459 is not “missing altogether” an element of generic burglary, but instead contains a broader version of the element of unlawfulness of entry. Accordingly, the modified categorical approach properly applies here and, under it, petitioner's previous conviction qualifies as generic burglary under the ACCA.



**A. Under The ACCA, The Modified Categorical Approach Permits A Sentencing Court To Classify A Previous Conviction As A Violent Felony If The Jury Was Actually Required To Find, Or The Defendant Necessarily Admitted, The Elements Of A Generic Offense In Connection With The Previous Conviction**

This Court has recognized since *Taylor*, 495 U.S. at 602, that because some state burglary statutes criminalize a broader range of conduct than generic burglary—or more precisely, the elements of some state burglary crimes are broader than the corresponding elements of generic burglary—a sentencing court must apply a principled method to identify with “certainty,” *Shepard v. United States*, 544 U.S. 13, 21 (2005), which convictions under those broader statutes were for the offense of generic burglary. That method has been referred to as the modified categorical approach. A correct application of that approach is informed not only by the statutory definition of the state crime in question, but also by judicial interpretations of the crime. And the ultimate inquiry under the modified categorical approach is whether “a jury was actually required to find all the elements of [a] generic [offense],” *Taylor*, 495 U.S. at 602, or whether “a plea of guilty to [an offense] defined by a nongeneric statute necessarily admitted elements of the generic offense,” *Shepard*, 544 U.S. at 26.

**1. The categorical and modified categorical approaches**

The ACCA defines a “violent felony” to include “burglary.” 18 U.S.C. 924(e)(2)(B). In *Taylor*, this Court held that the ACCA’s reference to “burglary” includes “ordinary burglaries,” 495 U.S. at 597, which the Court specified as “having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime,” *id.* at 599.

The Court understood that Congress classified such burglaries as violent felonies because “[t]he fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.” *Id.* at 588.

This Court saw no difficulty in applying that definition of generic burglary when the statute of conviction is “narrower than the generic view,” because “the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary.” *Taylor*, 495 U.S. at 599. The Court referred to that analysis as a “categorical approach.” *Id.* at 600. The Court pointed out that some States, however, “define burglary more broadly [than the generic definition], e.g., by eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings,” presenting “the problem of applying [the definition of ‘burglary’] to cases in which the state statute under which a defendant is convicted varies from the generic definition of ‘burglary.’” *Id.* at 599. In that situation, the Court explained, the inquiry should turn “not [on] the facts of each defendant’s conduct,” but instead on “the elements of the statute of conviction.” *Id.* at 601; see *id.* at 600 (noting that the ACCA refers to “convictions” for crimes, “not to the facts underlying the prior convictions”).

This Court anticipated that, with respect to convictions under such broader state burglary statutes, the “categorical approach \* \* \* may permit the sentencing court to go beyond the mere fact of conviction” and examine whether, for example, “a jury was actually required to find all the elements of generic burglary.”

*Taylor*, 495 U.S. at 602. As an example of an offense that would on this approach qualify as “burglary” under the ACCA, the Court offered a conviction under a state burglary law that permits conviction for a burglary of an automobile (which is not a generic burglary), but in which “the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict.” *Ibid.* The Court “therefore h[e]ld that an offense constitute[d] ‘burglary’ for purposes of [the ACCA] if \* \* \* the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant.” *Ibid.* The Court has since referred to that analysis as the “modified categorical approach.” *Johnson v. United States*, 130 S. Ct. 1265, 1273 (2010) (citation omitted).

In *Shepard*, this Court applied the modified categorical approach to a conviction entered upon a guilty plea. In that situation, *Shepard* held that the modified categorical approach permits the sentencing court to consider not only the charging instrument but also “the statement of factual basis for the charge” as shown by a plea colloquy, a written plea agreement, or “a record of comparable findings of fact adopted by the defendant upon entering the plea.” 544 U.S. at 20, 26. *Shepard* explained that the sentencing court would examine those materials to “tell whether the plea had ‘necessarily’ rested on the fact identifying the burglary as generic.” *Id.* at 21 (quoting *Taylor*, 495 U.S. at 602).

To vindicate “*Taylor*’s demand for certainty,” 544 U.S. at 21, however, *Shepard* rejected the view that the modified categorical approach permitted a sentencing court to consider other records—such as a police report

submitted to the state court in the prior proceedings in support of the issuance of a complaint—that do not shed light on the facts on which the court relied in accepting the plea. *Id.* at 21-23. To achieve a high level of assurance that the defendant’s previous conviction was for the generic offense, *Shepard* “require[d] that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State.” *Id.* at 23.<sup>3</sup>

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<sup>3</sup> This Court developed the categorical and modified categorical approaches in cases arising under the “burglary” provision of the ACCA, and it has principally discussed those approaches in cases arising under the ACCA. Lower courts have also applied those approaches to provisions of the Sentencing Guidelines and other statutory recidivist sentencing provisions that in some respects resemble the ACCA. See, e.g., 18 U.S.C. 2252A(b) (2006 & Supp. V 2011) (providing increased sentences for child pornography offenses committed by defendants with, *inter alia*, a previous conviction for child sexual abuse); Sentencing Guidelines § 2L1.2 comment. (n.1(B)(iii)) (illegal reentry guideline enhancement commentary defining “crime of violence”); *id.* § 4B1.2(a) (career offender guideline defining “crime of violence”). The Sentencing Commission, however, is free to adopt guidelines that operate in a manner different from the ACCA in considering a defendant’s criminal record. In particular, the advisory Sentencing Guidelines operate only within statutory minimum and maximum terms and thus raise no danger of impermissible judicial fact-finding. See *United States v. Booker*, 543 U.S. 220 (2005).

In addition, this Court and lower courts have sometimes applied (e.g., *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007)) and sometimes rejected (e.g., *Nijhawan v. Holder*, 557 U.S. 29 (2009)) those approaches in cases reviewing decisions of the Board of Immigration Appeals (BIA) under certain provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, such as 8 U.S.C. 1101(a)(43) (defining “aggravated felony”). *Taylor*, however, is not necessarily controlling on the BIA because the BIA is entitled to deference on its interpretation of an immigration statute, as long as it is reasonable, see *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-425



**2. *Judicial interpretations of state criminal statutes are often functionally equivalent to the explicit divisions in statutes this Court has used to illustrate the application of the modified categorical approach***

This Court has on several occasions illustrated the modified categorical approach using a state statute that explicitly enumerates two or more ways a particular element of the state crime can be satisfied, where some (but not all) of those enumerated possibilities will qualify as the generic crime. But it has never held that the modified categorical approach is limited to crimes whose elements are explicitly defined in that manner. Indeed, judicial interpretations of state criminal statutes often produce results that are the functional equivalent of such explicitly divisible statutes. Accordingly, the modified categorical approach should apply to any offense where some (but not all) of the violations result in convictions for the generic crime.<sup>4</sup>

a. This Court's decisions clearly permit the use of a modified categorical approach in the context of explicitly divisible statutes, *i.e.*, statutes that textually offer alternative ways to violate the provision, some of which constitute a violent felony and some of which do not. See *Johnson*, 130 S. Ct. at 1273 (noting that the Court's decisions "permit[]" the use of a modified categorical approach when a defendant has been convicted under a

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(1999), and therefore may select a *Taylor*-like approach or a more flexible approach to analysis of prior convictions.

<sup>4</sup> Although for convenience this brief refers to previous convictions for "state" crimes under "state" statutes, the ACCA in fact reaches more broadly. See 18 U.S.C. 924(e)(1) (referring to "previous convictions by any court referred to in [18 U.S.C.] 922(g)(1)"); 18 U.S.C. 924(e)(2)(B) (referring to "any crime punishable by imprisonment for a term exceeding one year," as qualified by 18 U.S.C. 921(a)(20)).

law that “contains statutory phrases that cover several generic crimes \* \* \* to determine which statutory phrase was the basis for the conviction”); accord *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009). Some courts have referred to such statutes as “divisible,” but for clarity, this brief refers to such statutes as “explicitly divisible” because the divisions are made explicit in the statute.

This Court has not addressed how the modified categorical approach applies to crimes that are neither categorically a generic crime nor can be narrowed to a generic crime by identifying a specific textual provision of an explicitly divisible statute. Despite suggestions to the contrary in petitioner’s brief (at 24-26) and some lower court opinions (e.g., *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 949-951 (9th Cir. 2011) (en banc) (Berzon, J., concurring in the judgment)), neither *Nijhawan* nor *Johnson* limited the application of the modified categorical approach to convictions under explicitly divisible statutes.

*Nijhawan* described the list of record materials approved by *Shepard* as “developed \* \* \* for \* \* \* [the] purpose \* \* \* of determining which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction.” *Nijhawan*, 557 U.S. at 41. That accurately describes the circumstances in *Shepard*, inasmuch as the Massachusetts statutes in *Shepard* were explicitly divisible, but that says nothing about the other circumstances in which *Shepard* records would properly be consulted.

In *Johnson*, the government argued that a Florida battery statute, Fla. Stat. Ann. § 784.03(1)(a) (West 2007), was categorically a “violent felony” under 18



U.S.C. 924(e)(2)(B)(i) because it “ha[d] as an element the use \* \* \* of physical force against the person of another,” *ibid*. This Court rejected that argument, holding that “the phrase ‘physical force’ means *violent* force—that is, force capable of causing physical pain or injury to another person.” *Johnson*, 130 S. Ct. at 1271. The Court noted that “[w]hen the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not, the ‘modified categorical approach’ \* \* \* permits a court to determine which statutory phrase was the basis for the conviction” by consulting judicially noticeable documents. *Id.* at 1273 (citation omitted). As in *Nijhawan*, that statement accurately reflected the Court’s actual applications of the modified categorical approach. And it was a particularly apt observation in the context of the statute at issue in *Johnson*, which was explicitly divisible into some battery offenses that involved violent force and some that did not. See *id.* at 1269.

In short, “the Court’s discussions of the modified categorical approach [have been] illustrative rather than prescriptive on” the question of the circumstances in which the modified categorical approach can properly be applied. *Aguila-Montes*, 655 F.3d at 931.

b. In several situations, a state crime without explicit divisions will be defined too broadly to qualify categorically as a violent felony, yet the modified categorical approach should still be applied in light of state judicial decisions. This brief refers to such statutes as “judicially divisible.” As discussed below, no functional difference exists between an explicitly divisible statute and a judicially divisible statute.

*First*, some state common law crimes are too broad to qualify as a violent felony categorically, but judicial decisions make clear that the common law crime encompasses a variety of offenses, some of which would be a violent felony. Such common law crimes are functionally indistinguishable from a statute that expressly codifies the same elements.

For example, Massachusetts's simple assault and battery statute provides only that "[w]hoever commits an assault or an assault and battery upon another shall be punished [as provided]." Mass. Ann. Laws ch. 265, § 13A(a) (LexisNexis 2010). By common law judicial definition, "the statute encompasses three types of battery: (1) harmful battery; (2) offensive battery; and (3) reckless battery." *United States v. Holloway*, 630 F.3d 252, 257 (1st Cir. 2011) (citing *Commonwealth v. Boyd*, 897 N.E.2d 71, 76 (Mass. App. Ct. 2008), review denied, 901 N.E.2d 137 (Mass. 2009)). The First Circuit has held that a conviction for Massachusetts simple assault and battery is not categorically a violent felony because that crime "encompasses a category of offenses which are no more than offensive touchings." *Id.* at 260. But a conviction for which the *Shepard* records show, under the modified categorical approach, that the offense was of the "harmful battery" variety does qualify as a violent felony. See *id.* at 257 (discussing *United States v. Mangos*, 134 F.3d 460, 464 (1st Cir. 1998)); *id.* at 263 (remanding to allow the government to introduce *Shepard* records).

*Second*, even when not formally prescribing the elements of common law crimes, state courts (and federal courts for that matter) interpret the legislature's work. A judicial interpretation of a criminal statute that is not explicitly divisible will often clarify the elements of a

criminal offense in a way that is functionally indistinguishable from a legislatively drawn explicitly divisible statute. See *United States v. Gomez*, 690 F.3d 194, 207-208 (4th Cir. 2012) (Niemeyer, J., dissenting) (giving examples of cases in which “state[] courts have construed the [State’s] statutes to include both conduct that qualifies as violent so as to qualify as a predicate offense and conduct that is nonviolent that does not qualify as a predicate offense”).

Lower courts have repeatedly encountered such a situation in the wake of this Court’s holding in *Chambers v. United States*, 555 U.S. 122 (2009), that the Illinois crime of failure to report for penal confinement is not a violent felony. The Illinois statute “place[d] together in a single numbered statutory section several different” “separately describe[d] \* \* \* behaviors” ranging from prison escape, to failure to report for confinement, to failure to abide by the terms of home confinement. *Id.* at 126 (citing 720 Ill. Comp. Stat. § 5/31-6(a) (West Supp. 2008)). The Court held that “a failure to report \* \* \* is a separate crime, different from escape,” *ibid.*, and analyzed it accordingly. In applying *Chambers*, lower courts have found that “under the federal escape statute and broadly worded statutes in many States, failures to return are not separately listed but are nonetheless encompassed in the conduct prohibited” according to judicial interpretation of the statutes. *United States v. Parks*, 620 F.3d 911, 913 (8th Cir. 2010) (citing 18 U.S.C. 751(a)), cert. denied, 132 S. Ct. 125 (2011). Recognizing, in light of state judicial decisions, that such broadly worded statutes embrace several of the offenses explicitly enumerated in the Illinois statute at issue in *Chambers*, courts have applied a modified categorical approach to determine whether a

previous conviction under a broadly worded escape statute is properly treated as a failure to report controlled by *Chambers* or instead as a different form of escape that must be independently analyzed.<sup>5</sup>

Lower courts have also confronted a similar situation in classifying under the ACCA previous convictions for state-law counterparts to 18 U.S.C. 924(c). Generally speaking, such provisions make it an aggravated crime to use or possess certain weapons in connection with the commission of a specified type of predicate offense. Because commission of the aggravated crime necessarily implies guilt of the predicate offense, the aggravated crime will be a violent felony if the predicate offense is. But because state law often refers to the predicate offenses as a broad class—*e.g.*, “any felony defined by Illinois law,” *United States v. Fife*, 624 F.3d 441, 444 (7th Cir. 2010) (quoting 720 Ill. Comp. Stat. § 5/33A-2), cert. denied, 131 S. Ct. 1536 (2011), or simply “a felony,” *United States v. Gibbs*, 656 F.3d 180, 187 (3d Cir. 2011) (quoting Del. Code Ann. tit. 11, § 1449), cert. denied, 132 S. Ct. 1125 (2012)—such state statutes are too broad to qualify categorically as violent felonies, yet they are not explicitly divisible. Lower courts have sensibly interpreted those statutes judicially to refer to all qualifying predicate offenses; consequently “[t]here is no need that each potential felony be explicitly listed and separately enumerated as a subsection, because the practical effect is the same.” *Fife*, 624 F.3d at 446.

*Third*, a court may also infer an offense element that is seemingly lacking from the express text of the state

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<sup>5</sup> See, *e.g.*, *United States v. Koufos*, 666 F.3d 1243, 1253 (10th Cir. 2011), cert. denied, 132 S. Ct. 2787 (2012); *Parks*, 620 F.3d at 913-916; but see *United States v. Hart*, 578 F.3d 674, 680-681 (7th Cir. 2009) (refusing to apply modified categorical approach to 18 U.S.C. 751(a)).



statute, relying on extratextual sources such as common law traditions or a presumption against strict liability criminal offenses. Functionally, such interpretations announce no more than what the legislature might otherwise have stated explicitly. See, e.g., *Higgins v. Holder*, 677 F.3d 97, 105-107 (2d Cir. 2012) (per curiam) (citing *State v. Cavallo*, 513 A.2d 646, 649 (Conn. 1986)) (relying on a judicially implied *mens rea* element to conclude that a conviction for Connecticut's tampering with a witness law was "categorically 'an offense relating to obstruction of justice' under 8 U.S.C. § 1101(a)(43)").

As discussed below, pp. 35-39, *infra*, California Penal Code § 459 similarly must be read in light of judicial interpretations. The literal text of that burglary statute covers all entries of the enumerated places, saying nothing about whether the entry must be unlawful (in the generic-burglary sense or otherwise). Yet California jurisprudence makes clear that California burglary requires an entry that is in one sense unlawful because it "invades a possessory right in a building," "by a person who has no right to be in the building." *People v. Gauze*, 542 P.2d 1365, 1367 (Cal. 1975). As a result, California burglary embraces not only offenses that would have satisfied generic burglary's requirement of unlawfulness of entry, but also entries that exceed the implied consent to enter premises open to the public for lawful purposes (such as entering a store with the intent to shoplift). *Id.* at 1366-1367; cf. *Taylor*, 495 U.S. at 591.

**3. No sound justification supports limiting the modified categorical approach to convictions under explicitly divisible statutes**

Whether a previous conviction was entered under an explicitly divisible state statute or under a judicially divisible one, the ACCA's purpose, sentencing princi-

ples, and practical considerations support application of the same modified categorical approach.

a. The purpose of the ACCA is unrelated to whether a previous conviction was entered under an explicitly divisible state statute or under a judicially divisible one. “[T]he [ACCA] focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun.” *Begay v. United States*, 553 U.S. 137, 146 (2008) (citing *Taylor*, 495 U.S. at 587-588). “In order to determine which offenders fall into this category, the Act looks to past crimes” when those “prior crimes reveal a degree of callousness toward risk” and show “that the offender is the kind of person who might deliberately point the gun and pull the trigger.” *Ibid.*

Experience has confirmed that the modified categorical approach is essential to effectuate *Taylor*’s elements-focused approach. State burglary offenses, for example, often may be drawn more broadly than generic burglary. See Wayne R. LaFare, *Criminal Law* § 21.1(a), at 1072 n.27 (5th ed. 2010) (*LaFare*) (showing that some state burglary statutes are broader as to element of unlawfulness of entry); *id.* § 21.1(b), at 1073 n.38 (“Just what constitutes an entry \* \* \* sometimes is disputed.”); *id.* § 21.1(c), at 1076 n.76 (showing that many state burglary statutes are broader as to place burgled). Without the modified categorical approach, convictions under many burglary statutes, despite reflecting the very sort of violent criminal history that Congress was concerned about in the ACCA, would nonetheless never qualify as violent felonies.

The ACCA’s purpose has nothing to do with the structure of a statute, or whether the text of the statute is phrased in the disjunctive, or whether judicial deci-



sions illuminate what offenses fall under a particular state criminal provision. In turn, the applicability of the modified categorical approach should not depend on those considerations.<sup>6</sup> Artificially limiting the use of the modified categorical approach would be underinclusive and lead to unwarranted sentencing disparities among similarly situated offenders. “[A] person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to” define burglary in an explicitly divisible statute. *Taylor*, 495 U.S. at 590-591. Such results would be contrary to Congress’s purpose in the ACCA and its predecessor of ensuring “that the same type of conduct is punishable on the Federal level in all cases.” S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983); see *Taylor*, 495 U.S. at 581-590 (tracing the ACCA’s legislative history). And those disparities

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<sup>6</sup> See *Aguila-Montes*, 655 F.3d at 927 (Bybee, J.) (“The only conceptual difference between [an explicitly divisible] statute and [any other] statute is that the former creates an *explicitly* finite list of possible means of commission, while the latter creates as *implied* list of every means of commission that otherwise fits the definition of a given crime.”); *United States v. Woods*, 576 F.3d 400, 415 (7th Cir. 2009) (Easterbrook, C.J., dissenting) (“[Consider a] statute provid[ing] that ‘any person who enters a building with an intent to commit a felony therein’ commits burglary. There’s nothing ‘divisible’ about that law[.] \* \* \* [Yet] the sentencing judge may look at the charging papers or guilty-plea colloquy to see whether the person was convicted of entering a house rather than a barn.”); *Li v. Ashcroft*, 389 F.3d 892, 899 (9th Cir. 2004) (Kozinski, J., concurring) (“[S]uppose the generic crime requires that the defendant have used a gun, while the crime of conviction can be committed with any kind of weapon. The government may then use the indictment and other documents in the record to prove that, because the jury convicted the defendant, it must have done so by finding that he used a gun.”).

would be particularly arbitrary because they would arise from an aspect of state law—how much of it is captured in statutory text as compared to judicial interpretations—that has no relevance to or effect on the State’s own prosecutions.

For example, a prior conviction for “statutory rape” merits an enhancement under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii). *Id.* § 2L1.2, comment. (n.1(b)(iii)); see *United States v. Lopez-DeLeon*, 513 F.3d 472, 473-474 (5th Cir.), cert. denied, 553 U.S. 1099 (2008). “Statutory rape” in that context has been interpreted generically to mean engaging in a sexual act with a person under the age of consent, and some courts have held the age of consent for generic statutory rape to be 16. See, e.g., *id.* at 474-475. But some state statutory rape statutes, such as California Penal Code § 261.5(a), set the age of consent at 18, thus sweeping more broadly than that definition of generic statutory rape. No sound basis exists for refusing to apply the modified categorical approach to identify convictions for which the victim’s age qualified the offense not only under state law but under the operative generic definition as well. See *Lopez-DeLeon*, 513 F.3d at 475-476 (applying modified categorical approach to a conviction under California Penal Code § 261.5(c) and finding it qualified as generic statutory rape because *Shepard* records established the victim was under age 14).

b. Nor is there a distinction in principle between explicit divisibility in the legislatively adopted text of the statute and judicial divisibility that arises from an interpretation of statutory text. State judicial decisions are as much a part of state law as state statutes. See *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (“[S]tate law as announced by the highest court of the

State is to be followed. This is not a diversity case but the same principle may be applied for the same reasons, *viz.*, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law."). In keeping with that general principle, this Court in *James v. United States*, 550 U.S. 192 (2007), relied on state judicial decisions clarifying and narrowing the scope of the Florida law of criminal attempt. *Id.* at 202 ("[W]hile the statutory language [of Florida attempt law] is broad, the Florida Supreme Court has considerably narrowed its application in the context of attempted burglary."). That approach should be consistently applied throughout the ACCA.

Some courts have suggested that applying the modified categorical approach in the absence of an explicitly divisible statute would impermissibly entail examining the factual circumstances of a previous conviction. See, *e.g.*, *Gomez*, 690 F.3d at 200 ("[I]f the district court were to apply the modified categorical approach to an indivisible statute, it would be required to look at the manner in which the defendant committed the crime (i.e., the specific factual circumstances of the crime) in direct contravention of Supreme Court dictates."). But *Shepard's* constraints and the objective of the modified categorical approach to identify the necessary basis for the conviction resolve any concern about a later sentencing court confronting disputes over the circumstances of previous convictions. Indeed, on the logic of *Gomez* and similar decisions, the modified categorical approach would *never* be permissible—not even when applied to an explicitly divisible statute—because the very essence of that approach is to examine "whether the [conviction] had 'necessarily' rested *on the fact* identifying the [offense] as generic." *Shepard*, 544 U.S. at 21 (emphasis

added) (quoting *Taylor*, 495 U.S. at 602); accord *Aguila-Montes*, 655 F.3d at 935 (“a modified categorical approach \* \* \* considers to some degree the factual basis for the defendant’s conviction—as determined by looking at the limited universe of *Shepard* documents”). As discussed immediately below, a court applying the modified categorical approach engages in substantially the same exercise whether or not the statute of conviction is explicitly divisible.

c. In the practical application of a generic-crime provision of the ACCA, nothing—aside from the sources of law that must be consulted—distinguishes applying the modified categorical approach to an explicitly divisible statute and applying it to a judicially divisible statute. Either way, a court must (1) determine the elements of the crime defined by the state statute, (2) establish how those elements correspond to the elements of the generic crime, (3) identify which elements of the state crime are coextensive with or narrower than the corresponding element of the generic crime (because those elements are categorically satisfied without reference to *Shepard* records), and (4) identify which elements of the state crime are broader than the corresponding element of the generic crime (because those broad elements can be narrowed only by examining *Shepard* records under the modified categorical approach).

The *Shepard* records are then used to decide whether “a jury was *actually required* to find all the elements of [a] generic [offense],” *Taylor*, 495 U.S. at 602 (emphasis added), or whether “a plea of guilty to [an offense] defined by a nongeneric statute *necessarily admitted* elements of the generic offense,” *Shepard*, 544 U.S. at 26 (emphasis added). See *Gomez*, 690 F.3d at 208 (Niemeyer, J., dissenting); *Aguila-Montes*, 655 F.3d at 937



(explaining that the modified categorical approach “asks what facts the conviction ‘necessarily rested’ on \* \* \* as revealed in the relevant *Shepard* documents, and whether these facts satisfy the elements of the generic offense”). In that analysis, a sentencing court may need to consult various sources of state law to decide whether that generic element was indeed “necessarily” or “actually” the basis for the defendant’s previous conviction. But *which* source of law it consults for that confirmation—an explicitly divisible state statute or a judicial interpretation or some combination—makes no practical difference.

That analysis protects defendants’ rights against judicial fact-finding in two ways. First, *Shepard* sharply limits the universe of records to which a sentencing court may resort. See 544 U.S. at 26. In some cases, the government will be unable to make the required showing. See *Johnson*, 130 S. Ct. at 1273 (noting that the “absence of records will often frustrate application of the modified categorical approach”); *Shepard*, 544 U.S. at 17-19 (discussing limited records available in that case). And sometimes the *Shepard* records are insufficiently specific about the basis for conviction, in which case the prior conviction is not counted. Second, *Taylor* and *Shepard* demand that a previous conviction will qualify as a violent felony only if those limited records show that the jury in the prior case was “actually required to find,” *Taylor*, 495 U.S. at 602, or the defendant “necessarily admitted,” *Shepard*, 544 U.S. at 26, the elements of the generic crime. Together, those confine the modified categorical approach to the narrow circumstances in which the government’s showing satisfies “*Taylor*’s demand for certainty when identifying a generic offense,” *id.* at 21. Indeed, petitioner himself

concedes that such “[e]lement-based factual allegations contained in *Shepard* documents can be deemed reliable because the defendant has every incentive to contest or disprove them: in their absence, he cannot be convicted at all.” Pet. Br. 34.

**4. *Petitioner’s constitutional and practical concerns have no force when the modified categorical approach is properly defined and applied based on Shepard-approved records***

Petitioner raises constitutional (Pet. Br. 29-33) and practical (*id.* at 33-37) concerns with applying the modified categorical approach when the state “offense of which [a defendant] was convicted is missing altogether [a] generic element,” *id.* at 7. See also Amicus Br. 22-33. Those concerns are associated with “evidentiary enquiries into the factual basis for the earlier conviction” that the categorical approach seeks to avoid. *Shepard*, 544 U.S. at 20. This contention misconceives the modified categorical approach. If the crime of which a defendant was previously convicted is “missing altogether” an element corresponding to an element of the generic crime, then the defendant cannot have “necessarily admitted” the generic element, because it had no relevance to the previous conviction; any extraneous indication in the *Shepard* records that the defendant’s actual conduct might have established the “missing” generic element would be outside the proper scope of the sentencing court’s inquiry. For example, the offense of failure to report for penal confinement is not categorically a violent felony, see *Chambers, supra*, and would not become one under the modified categorical approach even if the defendant had stated in his plea colloquy that he was committing a burglary at the time he had been ordered to report for confinement, because that fact would not



be necessary to his conviction. But petitioner's concerns are not implicated here with respect to a burglary conviction under California Penal Code § 459, see pp. 35-39, *infra*, and they should never be implicated in a proper application of the modified categorical approach under the ACCA.

a. Petitioner and his amici suggest (Pet. Br. 29-33, Amicus Br. 22-28) that analyzing petitioner's burglary conviction under the modified categorical approach would raise serious constitutional concerns under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* holds that the Sixth Amendment requires any fact "[o]ther than the fact of a prior conviction" to be submitted to a jury and proved beyond a reasonable doubt (or admitted by the defendant) when it increases the penalty for a crime beyond the otherwise-applicable maximum term of imprisonment. *Id.* at 490. In general, the use of prior convictions to increase the maximum penalty for a crime—as the ACCA does with respect to violations of 18 U.S.C. 922(g)(1)—is valid under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *Almendarez-Torres* holds that the fact of a prior conviction used to increase the defendant's sentence above the otherwise-applicable maximum term of imprisonment may be found by the sentencing judge by a preponderance of the evidence and need not be alleged in the indictment or proved to a jury beyond a reasonable doubt. *Id.* at 239-247.<sup>7</sup>

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<sup>7</sup> Petitioner argued below (see J.A. 71a-72a) and in the second question presented in his petition for a writ of certiorari (Pet. 23-26) that *Almendarez-Torres* should be overruled. But this Court granted certiorari limited to the first question presented in the petition. And the Court has repeatedly affirmed that the Sixth Amendment rule announced in *Apprendi* applies only to penalty-enhancing facts

Petitioner and his amici nonetheless contend (Pet. Br. 29-33, Amicus Br. 23-28) that the courts below exceeded the bounds of *Almendarez-Torres* in their examination of *Shepard* records relating to petitioner's burglary conviction. Their argument rests on the premise that the lower courts here used those records to examine "surplus allegations in a charging document" (Pet. Br. 31) or "a fact that is not an element of the [state] offense" (Amicus Br. 25). A plurality in *Shepard* voiced similar concerns as a basis for limiting the universe of documents an ACCA sentencing court may consider. See 544 U.S. at 24-26 (suggesting that allowing a "sentencing judge considering the ACCA enhancement" to "make a disputed finding of fact" would raise constitutional concerns). And in the context of another federal offense that depends on prior convictions, 18 U.S.C. 922(g)(9), this Court has suggested (without elaboration) that facts extraneous to the elements of a prior offense could not simply be drawn from records of the prior conviction but instead would need to be proved to a jury beyond a reasonable doubt or admitted by the defendant in the federal proceeding. See *United States v. Hayes*, 555 U.S. 415, 426 (2009).

But those concerns are not implicated here. Determining the nature of a prior conviction involves only an assessment of what "a jury was actually required to find," *Taylor*, 495 U.S. at 602, or the defendant "necessarily admitted" in pleading guilty, *Shepard*, 544 U.S. at 26. Examining *Shepard* records for that purpose is not fact-finding under *Apprendi*. Rather, it is a legal inquiry into what those records reveal about the basis for

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"other than the fact of a prior conviction." *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2348 (2012); see, e.g., *James*, 550 U.S. at 214 n.8.

the conviction. See, e.g., *United States v. Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992) (Breyer, C.J.) (explaining that a court applying the modified categorical approach looks to state-court records “not because the court may properly be interested \* \* \* in the violent or non-violent nature of that particular conduct,” but because that information “may indicate that \* \* \* the generically violent crime (‘building’), rather than the generically non-violent crime (‘vehicle’) was at issue” at trial or in a guilty plea).

As for the Sixth Amendment in particular, when the modified categorical approach is used to decide whether “a jury was actually required to find all the elements of [a] generic [offense],” *Taylor*, 495 U.S. at 602, the defendant has already enjoyed his Sixth Amendment right to a jury determination of those elements. And when *Shepard*-approved documents establish that “a [prior] plea of guilty to [an offense] defined by a nongeneric statute necessarily admitted elements of the generic offense,” *Shepard*, 544 U.S. at 26, the defendant has waived his right to a jury determination of those facts. The modified categorical approach—limited to *Shepard*-approved records, partly because of the *Shepard* plurality’s constitutional concerns—is therefore consistent with the whole of this Court’s Sixth Amendment jurisprudence.

b. For similar reasons, petitioner is mistaken in his concern that the ACCA would permit an enhanced sentence on the basis of “factual assertions whose reliability is deeply suspect” and which “the defendant had no incentive to contest,” Pet. Br. 33. Because the modified categorical approach takes into account only matters actually found by a jury or necessarily admitted by the defendant—and thus excludes conduct extraneous to the

previous conviction, such as surplusage in charging instruments and superfluous admissions made during a plea colloquy—no significant worry arises that a defendant pleading guilty will let pass misstatements about the very acts offered to establish his criminality. “Rel[iance] on a narrow and defined range of [*Shepard*-approved records] ensures that the defendant will have understood and had an opportunity to contest all facts which are necessary to his [previous] conviction.” *Aguila-Montes*, 655 F.3d at 938. A guilty plea entails a waiver of important constitutional protections against the erroneous deprivation of liberty, undertaken with the advice of counsel, awareness of the consequences, and a colloquy with the court. Against that backdrop, a defendant’s admissions necessary to establishing his guilt furnish a reliable means for ascertaining the basis for his conviction.

Petitioner contests this principle when a defendant can claim he had “no practical reason or incentive to contest” a particular issue because his guilt did not depend on which factual variant of the offense he committed. Pet. Br. 34. Perhaps a defendant convicted under a state burglary statute that punishes equally entries into buildings and automobiles has, in some sense, a reduced incentive to contest whether the place he entered was a building or an automobile, because the outcome of the state proceeding will be the same. But that theoretical concern could arise under any application of the modified categorical approach, even under explicitly divisible statutes, and nothing suggests that it has proven problematic in practice. *Taylor* and *Shepard* appropriately rejected such speculative concerns in favor of relying on matters that the jury was actually required to find or the defendant necessarily admitted



in pleading guilty to the state crime, as revealed by *Shepard*-approved records of the previous conviction.

**B. Some Convictions Under California Penal Code § 459 Are For Generic Burglary**

Contrary to petitioner's contention, California burglary is not "missing altogether," Pet. Br. 7, an element of generic burglary. Despite differing in the breadth of each element, California burglary and generic burglary both cover entries, of a particular wrongful kind, into particular places, with the intent to commit particular crimes. Accordingly, some but not all convictions under California Penal Code § 459 are for generic burglary. The modified categorical approach can therefore be used to identify convictions under Section 459 that are violent felonies.

- 1. A conviction under California Penal Code § 459 requires an entry, into one of an enumerated list of places, that invades a possessory right in that place, with the intent to commit theft or another felony*

The statute under which petitioner was convicted in 1978 provides in relevant part:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach, \* \* \* house car, \* \* \* inhabited camper, \* \* \* vehicle \* \* \* when the doors of such vehicle are locked, aircraft \* \* \*, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

Cal. Penal Code § 459 (effective Jan. 1, 1978); see *McNeill v. United States*, 131 S. Ct. 2218, 2222 (2011) ("[W]hen determining whether a defendant was convict-

ed of a 'violent felony,' we have turned to the version of state law that the defendant was actually convicted of violating." The text of the statute thus requires for conviction at least the elements of entry, of a particular place, with an intent to commit a particular crime.

Section 459 "does not explicitly require that a burglar's entry be 'unlawful,'" but "the Supreme Court of California has long held that unlawful entry is an element of burglary." *United States v. Painter*, 400 F.3d 1111, 1114 n.4 (8th Cir.) (citing *People v. Montoya*, 874 P.2d 903, 911 (Cal. 1994)), cert. denied, 546 U.S. 1035 (2005); accord *Aguila-Montes*, 655 F.3d at 941-944 (opinion of Bybee, J.). The leading California decision on the subject is *Gauze*, which confronted the question, "Can a person burglarize his own home?" 542 P.2d at 1365. The Supreme Court of California acknowledged that Section 459

is susceptible of two rational interpretations. On the one hand, it could be argued that the Legislature deliberately revoked the common law rule that burglary requires entry into the building of another. On the other hand, the Legislature may have impliedly incorporated the common law requirement by failing to enumerate one's own home as a possible object of burglary.

*Id.* at 1366 (footnote omitted). Tracing the statute's history, the Supreme Court of California concluded that Section 459 "preserve[s] the spirit of the common law" by retaining the "concept that burglary law is designed to protect a possessory right in property, rather than broadly to preserve any place from all crime." *Ibid.*

*Gauze* acknowledged that California's "codification of the burglary law" included "elimination of the requirement of a 'breaking,'" which "mean[s] that trespassory



entry [i]s no longer a necessary element of burglary” and therefore “a person could be convicted of burglary of a store even though he entered during regular business hours.” 542 P.2d at 1366-1367 (citing *People v. Barry*, 29 P. 1026 (Cal. 1892)). But *Gauze* cautioned:

*Barry* and its progeny should not be read, however, to hold that a defendant’s right to enter the premises is irrelevant. \* \* \* [T]he underlying principle of the *Barry* case is that a person has an implied invitation to enter a store during business hours for legal purposes only. The cases have preserved the common law principle that in order for burglary to occur, [t]he entry must be *without consent*.

*Id.* at 1367 (internal quotation marks and citation omitted). Accordingly, “burglary remains an entry which invades a possessory right in a building. And it still must be committed by a person who has no right to be in the building.” *Ibid.* A defendant therefore “cannot be guilty of burglarizing his own home.” *Ibid.*<sup>8</sup>

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<sup>8</sup> California cases have sometimes referred to the requirement of an invasion of a possessory right as an aspect of the entry element, rather than a distinct element. See, e.g., *People v. Waidla*, 996 P.2d 46, 65 (Cal.) (“Lack of consent was material to burglary because it was material to the element of entry.”), cert. denied, 531 U.S. 1018 (2000). For clarity of exposition, this brief discusses invasion of a possessory right separately from the element of entry to distinguish the former from the unrelated issue of what physical acts involving tools or appendages constitute “entry.” See, e.g., *Magness v. Superior Court*, 278 P.3d 259, 260 (Cal. 2012) (“[U]sing a remote control to open a garage door does not constitute an entry into the residence.”); Cal. Crim. Jury Instructions No. 1700 note, at 1235 (2012). But the analysis would be essentially the same if one described Section 459 as requiring (1) an entry invading a possessory interest (2) into one of an enumerated list of places, (3) with intent to commit a theft or felony, and correspondingly described generic burglary as requiring

The element of invasion of a possessory right can, obviously, be established by a classic breaking and entering, or other generically “unlawful” entry, such as one procured by fraud or threat of force, see 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(a), at 465 & nn.12-14 (1986) (*LaFave & Scott*). But California burglary’s element of invasion of a possessory right is broader than generic burglary’s element of unlawfulness in that the former also “permits a burglary conviction \* \* \* so long as the person enters with the intent to commit a felony and does not have an unconditional possessory right to enter,” such as a would-be shoplifter who enters a store during normal business hours. *Aguila-Montes*, 655 F.3d at 944 (opinion of Bybee, J.); accord *Barry*, *supra*; *People v. Pendleton*, 599 P.2d 649, 656 (Cal. 1979) (“The law after *Gauze* is that one may be convicted of burglary even if he enters with consent, provided he does not have an unconditional possessory right to enter.”); *People v. Frye*, 959 P.2d 183, 213 (Cal. 1998) (quoting *Pendleton*), cert. denied, 526 U.S. 1023 (1999), overruled on other grounds, *People v. Doolin*, 198 P.3d 11 (Cal.), cert. denied, 130 S. Ct. 168 (2009).

At the same time, Section 459’s requirement of an invasion of a possessory right imposes real limits. A defendant “cannot be guilty of burglarizing his own home,” even if he enters “for a felonious purpose,” because he “invade[s] no possessory right of habitation.” *Gauze*, 542 P.2d at 1367. Likewise, a defendant is not guilty of burglary if he is invited into the building by someone who has knowledge of his intended criminality—a situation sometimes referred to as “informed consent”—

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(1) an unlawful or unprivileged entry (2) into a building or structure, (3) with intent to commit a crime.

because that conduct does not invade the invitor's possessory right. *People v. Superior Court (Granillo)*, 253 Cal. Rptr. 316, 320-321 (Cal. Ct. App. 1988) (holding that defendant's entry into undercover police officer's apartment, at officer's invitation to sell stolen property, was not burglary). See generally *People v. Salemm*, 3 Cal. Rptr. 2d 398, 400 (Cal. Ct. App. 1992) ("[A] person who enters a structure enumerated in Penal Code section 459 with the intent to commit any felony is guilty of burglary except when he or she (1) has an unconditional possessory right to enter as the occupant of that structure or (2) is invited in by the occupant who knows of and endorses the felonious intent.").

California's conception of what makes an entry "unlawful" is therefore broader than the generic conception of "unlawful" entry, in that the California definition ranks as unlawful some entries into places open to the public, but Section 459 is assuredly not "missing altogether [a] generic element," Pet. Br. 7. "[I]t is not so much that California law *lacks* the requirement of unlawful or unprivileged entry; it simply contains a nuanced definition of 'unlawful or unprivileged' different from the common law definition." *Aguila-Montes*, 655 F.3d at 942 (opinion of Bybee, J.).<sup>9</sup>

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<sup>9</sup> Several other States, through judicial interpretations similar to California's, have defined burglary in a manner that appears to parallel California's approach. See *State v. Bull*, 276 P. 528 (Idaho 1929); *State v. Baker*, 161 N.W.2d 864 (Neb. 1968), cert. denied, 394 U.S. 949 (1969); *Hernandez v. State*, 50 P.3d 1100, 1113 (Nev. 2002) (per curiam), cert. denied, 537 U.S. 1197 (2003); *Clark v. Commonwealth*, 472 S.E.2d 663, 665 (Va. Ct. App. 1996) (citing *Davis v. Commonwealth*, 110 S.E. 356, 357 (Va. 1922)). Rejecting the government's position here would therefore raise the peculiar prospect that the ACCA would not recognize as "burglary" convictions in several States that (1) can be shown through *Shepard* records to be for

**2. Two elements of California Penal Code § 459 categorically correspond to the elements of generic burglary, while two elements are broader, calling for application of the modified categorical approach**

a. Two elements of California burglary categorically satisfy the corresponding element of generic burglary. First, Section 459 requires, and generic burglary is satisfied by, an entry. In that respect, California burglary is narrower than generic burglary, because generic burglary can also be committed by “remaining in” the place of the burglary, *Taylor*, 495 U.S. at 599.

Second, both Section 459 and generic burglary require for conviction that the defendant enter with the intent to commit a crime. In that respect too, Section 459 is narrower than generic burglary because it requires “intent to commit grand or petit larceny or any felony,” Cal. Penal Code § 459, while for generic burglary, “an intent to commit any offense will do,” *Taylor*, 495 U.S. at 598 (quoting 2 *LaFave & Scott* § 8.13(e), at 474).

b. The enumerated list of places that can be burglarized under California law is—as in several States, see 2 *LaFave & Scott* § 8.13(c), at 471 & nn.84-85—broader than the list of places that qualify under the ACCA, which “makes burglary a violent felony only if committed in a building or enclosed space \* \* \*, not in a boat or motor vehicle,” *Shepard*, 544 U.S. at 15-16. *Taylor* expressly states that the modified categorical approach can be used to narrow such a broad list of places using appropriate records of a defendant’s conviction. 495 U.S. at 602 (“[I]n a State whose burglary statutes include entry of an automobile as well as a building, if the

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generic burglary, (2) are labeled “burglary” by the State of conviction, and (3) entailed conduct that constitutes generic burglary.



indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.”); see *Shepard*, 544 U.S. at 17.

c. The dispute in this case turns on the existence and scope of Section 459’s requirement corresponding to generic burglary’s requirement that the entry be “unlawful or unprivileged.” As discussed above, Section 459 has such an element, although it is broader than the corresponding element of generic burglary.

i. Petitioner contends that the “offense of which [he] was convicted is missing altogether the generic element of unlawful or unprivileged entry into, or remaining in, a building.” Pet. Br. 7; accord Amicus Br. 13 (“Whereas generic federal burglary requires that the defendant’s entry be ‘unlawful or unprivileged,’ that element is entirely missing from California’s burglary statute.”). Petitioner offers no sound support for that claim.

Petitioner cites in support two federal appellate cases. Pet. Br. 37-38 (citing *United States v. Huizar*, 688 F.3d 1193 (10th Cir. 2012); *United States v. Gonzalez-Terrazas*, 529 F.3d 293 (5th Cir. 2008)). But those cases failed to recognize that, as judicially interpreted, Section 459 contains an element of unlawfulness that embraces a wider range of entries than generic burglary but still excludes entries into buildings in which the defendant has a possessory right. Petitioner and his amici also offer passing citations to California cases holding that “[a] defendant may be convicted of burglary under California law without any showing that his entry was unlawful” in the generic sense. Amicus Br. 13 (citing *Salemme*, 3 Cal. Rptr. 2d at 401); accord Pet. Br. 37-38

(citing *Frye, supra*; *People v. Deptula*, 373 P.2d 430, 431-432 (Cal. 1962)). That is true but irrelevant. It is equally true, to take *Shepard* as an example, that "a defendant *may* be convicted of burglary under [Massachusetts] law without any showing that his entry was [of a building or structure rather than a boat or motor vehicle]." But *Taylor* and *Shepard* make clear that the modified categorical approach can be used to separate convictions for offenses that actually are the generic crime from those that are not.

ii. As discussed above, pp. 35-39, *supra*, a Section 459 conviction requires conduct that "invades a possessory right" in the burgled property. Setting aside its greater breadth, that aspect of California law substantially corresponds to generic burglary's element of unlawfulness, as evident in three related ways. First, both elements descend from modern relaxation of the common law's insistence that only an entry effected by a breaking could be burglary. As the criminal law treatise this Court relied on in *Taylor*, 495 U.S. at 598, explained, "at least *some* of what was encompassed within the common law 'breaking' element is reflected [in modern burglary statutes] by other terms describing what kind of entry is necessary \* \* \* [such as] 'unlawfully,' \* \* \* 'unauthorized,' by 'trespass,' 'without authority,' 'without consent,' or 'without privilege.'" 2 *LaFare & Scott* § 8.13(a), at 466 (footnotes omitted). Likewise, *Gauze* explains that California "preserved the common law principle that in order for burglary to occur, [t]he entry must be *without consent*." 542 P.2d at 1367 (internal quotation marks and citation omitted).

Second, both elements perform the function of narrowing the class of all entries to the subset that implicate modern penological justifications for burglary



(which are quite removed from common-law burglary's justification of "protecting helpless citizens from the brigands who roam in the night," 2 *LaFave & Scott* § 8.13(g), at 476). See *id.* at 476-478 (critiquing the justifications for modern burglary law and expressing a favorable view of the Model Penal Code's approach of condemning "entry without privilege"); *Gauze*, 452 P.2d at 1366 (explaining that in Section 459 "the Legislature has preserved the concept [from the common law] that burglary law is designed to protect a possessory right in property, rather than broadly to preserve any place from crime").

Third, both elements are conceived principally as a way to exclude particular offense conduct from the criminal provision's reach. In the case of Section 459, it is to reject the possibility of burglarizing one's own property or in cases of informed consent. See, *e.g.*, *Salemme*, 3 Cal. Rptr. at 400. In the case of generic burglary, it is to eliminate a larger range of less serious conduct. See 2 *LaFave & Scott* § 8.13(a), at 467 & n.30 (noting that under Model Penal Code § 221.1 cmt., at 69 (1980), the situations particularly excluded are "a servant enters his employer's house as he is normally privileged to do, intending on the occasion to steal some silver; a shoplifter enters a department store during business hours to steal from the counters; a litigant enters the courthouse with the intent to commit perjury; a fireman called on to put out a fire resolves, as he breaks down the door of the burning house, to misappropriate some of the householder's belongings").

iii. *Taylor* itself supports the view that Section 459's requirement of the invasion of a possessory interest corresponds to generic burglary's requirement of unlawfulness, but is broader than generic burglary's. *Taylor*

noted that “modern statutes ‘generally require that the entry be unprivileged’” and accordingly limited generic burglary to an entry that was “unlawful or unprivileged.” 495 U.S. at 598 (quoting 2 *LaFave & Scott* § 8.13(a), at 466).<sup>10</sup> *Taylor* specifically identified California Penal Code § 459 as “defin[ing] ‘burglary’ so broadly as to include shoplifting,” and the Court said it would be an “odd result[]” to treat such an offense categorically as “burglary” under the ACCA, *id.* at 591, implying that the Court did not intend its definition of generic burglary to embrace all offenses under Section 459, but equally suggesting that a modified categorical analysis would be appropriate.

iv. The concurrence in *Aguila-Montes* suggested that invasion of a possessory interest “is *not* an element of burglary” and therefore cannot be taken into account under the modified categorical approach. 655 F.3d at 974 (Berzon, J., concurring in the judgment) (quoting *People v. Sherow*, 128 Cal. Rptr. 3d 255, 260 (Cal. Ct. App. 2011)). Judge Berzon’s analysis is unsound.

*Sherow* concludes that consent of the property occupant in an “informed consent” scenario is an affirmative defense to burglary. 128 Cal. Rptr. 3d at 259-260 (quoting *People v. Felix*, 28 Cal. Rptr. 2d 860, 867 (Cal. Ct. App. 1994)). In *Sherow* itself, the defendant sold stolen goods to a pawnshop, and the State “charged him with

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<sup>10</sup> Both the government and the defendant in *Taylor* urged definitions of generic burglary that did not include unlawfulness of entry, as such, as an element of the generic offense. See *Taylor*, 495 U.S. at 596 (defendant’s proposal); U.S. Br. at 6, 8, *Taylor*, *supra* (No. 88-7194) (relying on the definition of “burglary” in the ACCA’s predecessor, “entering or remaining surreptitiously within a building that is the property of another with intent to [commit a crime],” 18 U.S.C. App. 1202(c)(9), at 107 (Supp. II 1984) (repealed 1986)).

burglarizing the pawnshop by entering it with the intent to sell stolen property"; the theory of his defense was that the pawnshop's manager "knew that [he] was selling stolen [goods] and consented to him coming into the pawnshop for that purpose." *Id.* at 259. Under *Sherow*, the defendant must put consent at issue and bears the burden of proof, *id.* at 260-261, but that burden consists only of raising a reasonable doubt as to consent, *id.* at 261-264. For several reasons, *Sherow* and *Felix* do not undermine the conclusion that the modified categorical approach can be applied to identify an offense under Section 459 as generic burglary.

First, the intermediate appellate decisions in *Sherow* and *Felix* appear to misread controlling cases from the Supreme Court of California by treating consent as a defense, rather than treating invasion of a possessory right as an element. *Gauze*, for example, affirmatively describes invasion of a possessory interest as a component of the offense, not as a defense. 542 P.2d at 1367 ("A burglary remains an entry which invades a possessory right in a building."). *People v. Waidla*, 996 P.2d 46 (Cal.), cert. denied, 531 U.S. 1018 (2000), is even clearer:

Lack of consent was also disputed \* \* \*. As a fact going to an element of burglary \* \* \*, it was put into dispute by [the defendant's] plea of not guilty, and remained in dispute until it was resolved \* \* \*. \* \* \* [I]t had to be proved by the People, and proved beyond a reasonable doubt.

*Id.* at 65 (citation omitted); accord *Fortes v. Sacramento Mun. Court Dist.*, 170 Cal. Rptr. 292, 297 (Cal. Ct. App. 1980).

Second, even if *Sherow* were correct, the prosecution would still bear the burden of showing that the defendant lacked an unconditional possessory right in the place

burgled, despite having no burden to disprove the existence of informed consent on the part of whoever did hold that possessory right.

Third, in this case, petitioner's previous conviction rests on a guilty plea and the *Shepard* records show that the proceeding treated the issue of possessory right as if it were an element, by alleging the unlawfulness of petitioner's entry in the charging document and offering a factual basis for it in the plea colloquy. Whatever status an issue of consent would have had at trial, and however that would affect later application of the modified categorical approach, when the issue of possessory right was actually treated as an element in the previous proceeding, no purpose is served by refusing to likewise treat it as an element in applying the modified categorical approach now.

**C. The *Shepard* Records In Petitioner's Case Establish That His Conviction Was For Generic Burglary**

For the reasons discussed above, p. 40, *supra*, the entry and intent elements of petitioner's offense categorically establish the corresponding elements of generic burglary.<sup>11</sup> The place of petitioner's burglary was narrowed under the modified categorical approach from the list of places in Section 459 to the particular place of a

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<sup>11</sup> Because the intent element under Section 459 is narrower than the intent element for generic burglary, and thus a conviction under Section 459 categorically establishes that element, it is immaterial that, as petitioner pointed out below (Sent. Tr. 28; Pet. C.A. Br. 46), the plea colloquy for petitioner's burglary conviction did not expressly address petitioner's intent to commit a theft or felony in connection with breaking into the grocery store. And in any event, the criminal information to which petitioner pleaded guilty charged him with entry "with the intent to commit theft." J.A. 16a.



building, which satisfies the generic definition of burglary.<sup>12</sup>

As for the nature of the entry, the criminal information to which petitioner pleaded guilty charged him with “wilfully, *unlawfully* and feloniously enter[ing] a building \* \* \* with the intent to commit theft therein.” J.A. 15a (emphasis added). “Unlawfully” is best understood as an allegation that the entry invaded a possessory right held by someone other than the defendant. Some courts have understood a guilty plea to a charging instrument including such allegations to further establish unlawfulness in the particular sense in which *Taylor* defined generic burglary. See, e.g., *United States v. Rodriguez-Rodriguez*, 393 F.3d 849, 857-858 (9th Cir.), cert. denied, 544 U.S. 1041 (2005); *United States v. Torres-Gonzalez*, 1 Fed. Appx. 834, 836-837 (10th Cir.) (unpublished), cert. denied, 534 U.S. 936 (2001). Those decisions are incorrect because, absent some reason to believe otherwise, a California prosecutor would most naturally be expected to use “unlawfully” in a criminal information for a violation of Section 459 to describe an entry that invades a possessory right in a broad sense, rather than in the narrower sense in which this Court used the term “unlawful” in enunciating the elements of generic burglary in *Taylor*. Thus, the government agrees with courts that have concluded that, absent

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<sup>12</sup> Petitioner argued below (see J.A. 73a) and in the third question presented in his petition for a writ of certiorari (Pet. 21-24) that the district court engaged in impermissible factfinding in relying on the place of the burglary as “CentroMart,” a “grocery store,” J.A. 16a, 25a, to identify the place of the burglary as a building, rather than (say) a tent. The district court’s determination in that regard is not before this Court because the Court granted certiorari limited to the first question presented in the petition.

other *Shepard* records, a conviction under Section 459 for which the charging instrument simply alleged an unlawful entry of a building is *not* generic burglary, even applying the modified categorical approach. See, e.g., *Aguila-Montes*, 655 F.3d at 945-946 (opinion of Bybee, J.) (“[Q]uite simply, the word ‘unlawfully’ in [the defendant’s] indictment tells us nothing about whether his entry was ‘unlawful or unprivileged’ in the generic sense.”); *Huizar*, 688 F.3d at 1196-1197 (rejecting Sentencing Guidelines enhancement on that ground).

But the *Shepard* records in this case also include a guilty plea colloquy in which a factual basis was offered for petitioner’s offense:<sup>13</sup>

THE COURT: Is there a factual basis for the entry of the plea of guilty, Mr. Tauman [petitioner’s counsel]?

MR. TAUMAN: There is a factual basis.

THE COURT: Do you concur in that, Mr. DeSilva [the prosecutor]?

MR. DE SILVA: Yes, Your Honor.

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<sup>13</sup> In taking a guilty plea in California, “[t]he court shall \* \* \* cause an inquiry to be made of the defendant to satisfy itself \* \* \* that there is a factual basis for the plea.” Cal. Penal Code § 1192.5 (West Supp. 1978). Trial courts are not, however, obliged “to question the defendant personally about each element in the charged offense.” *People v. Holmes*, 84 P.3d 366, 371 (Cal. 2004). “A reference to a complaint containing a factual basis for each essential element of the crime will be sufficient \* \* \* to establish the factual basis for the plea.” *Ibid.*; see generally *In re Chavez*, 68 P.3d 347, 350 (Cal. 2003) (“A guilty plea admits every element of the charged offense.”). In light of the presumption of regularity that attends guilty plea proceedings, see *Parke v. Raley*, 506 U.S. 20, 29-30 (1992), federal courts can presume compliance with the factual basis requirement of petitioner’s plea here.



THE COURT: In substance, what does this involve?

MR. DE SILVA: This involves the breaking and entering of a grocery store.

THE COURT: On North California Street?

MR. DE SILVA: Yes, Your Honor.

THE COURT: All right. The Court will accept a plea of guilty to a violation of Section 459 of the Penal Code.

J.A. 25a.<sup>14</sup> Petitioner's burglary offense therefore satisfied California burglary's requirement of the invasion of a possessory right in a particular manner ("breaking") that establishes generic burglary's element of unlawfulness. See *Taylor*, 495 U.S. at 592-593 (explaining that common law "breaking" is part of the "core \* \* \* of the contemporary usage of ['burglary']"). In particular, the admission that petitioner entered by "breaking," J.A. 25a, was "necessarily" part of the factual basis on which the trial court accepted petitioner's plea. Without that admission, petitioner's supposed crime would have merely "involve[d] the \* \* \* entering of a grocery store," which is not burglary under Section 459. Accord-

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<sup>14</sup> Under Ninth Circuit law that petitioner does not directly challenge (see Pet. Br. 39 n.16), and which in any event lies beyond the scope of the question presented, a court applying the modified categorical approach may rely on a prosecutor's statement as to the factual basis for a guilty plea when that statement is offered on the record in the defendant's presence and the defendant does not object to it. See *United States v. Hernandez-Hernandez*, 431 F.3d 1212, 1219 (2005). Other circuits have taken a similar approach. See, e.g., *United States v. Mahone*, 662 F.3d 651, 656 (3d Cir. 2011); *United States v. Taylor*, 659 F.3d 339, 347-348 (4th Cir. 2011), cert. denied, 132 S. Ct. 1817 (2012).

ingly, the district court properly invoked and applied the modified categorical approach to classify petitioner's offense as generic burglary and thus a violent felony.

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2012

# **REPLY BRIEF**

IN THE  
**Supreme Court of the United States**

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MATTHEW ROBERT DESCAMPS,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**REPLY BRIEF FOR PETITIONER**

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**REPLY BRIEF**

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides for enhanced sentences for those felons convicted of gun possession who have three prior convictions for violent felonies. The statute specifically states that a conviction for an offense that “is burglary” is a violent felony. This Court has held that, to be “burglary” within the meaning of § 924(e), the prior offense must have an element of unlawful entry. *Taylor v. United States*, 495 U.S. 575, 598–99 & n.8 (1990). *Taylor* recognized that “[a] few States’ burglary statutes” define the offense denominated burglary “more broadly, *e.g.* by eliminating the requirement that entry be unlawful[.]” *Id.* at 599. California is one of those “few” states. Its burglary offense does not require an unlawful or unprivileged entry (*i.e.*, trespassory entry). Indeed, as this Court noted in *Taylor*, California “defines ‘burglary’ so broadly as to include shoplifting . . . .” *Id.* at 591. Because the element of unlawful entry is not required to establish a California burglary conviction, such a conviction is not for “burglary” in the generic, contemporary meaning given that term under § 924(e).

Although California law does not require an unlawful entry, the government claims that Mr. Descamps’s California burglary conviction can be made a § 924(e) burglary conviction under the “modified” categorical approach. The government’s view of the modified categorical approach allows consideration of facts unnecessary to a conviction, and even the manner and means involved in the commission of the offense. That view deviates sharply from this Court’s teachings, and from the textual and constitutional underpinnings of the

categorical approach. The modified categorical approach applies only when the law of the jurisdiction in which the prior conviction was obtained allows conviction under alternative elements, with one set of elements constituting an ACCA violent felony, while the other does not.

California law does not set out alternative entry elements for the offense of burglary – there is only an element of entry. There is no alternative statutory element of unlawful entry. Nor does California decisional law set out an alternative unlawful-entry element. As the California Supreme Court has made clear, the invasion-of-a-possessory-interest language in *People v. Gauze*, 542 P.2d 1365 (Cal. 1975), seized upon by the government, does not establish an unlawful-entry element for California burglary.

The government asks the Court to expand the modified categorical approach beyond its well-established bounds by allowing consideration of the facts underlying a particular conviction. That expansion runs contrary to § 924(e)'s text – the statute directs sentencing courts to identify whether a prior “conviction” is “for a violent felony,” not to assess whether the facts show that the defendant *could have* been convicted of a violent felony. The government's expansion also raises constitutional doubts, as it permits a federal sentencing court to make findings about conduct that occurred during a prior offense. And, the government's approach would engender significant litigation and defeat the goal of certainty in application of the § 924(e) enhancement.

**I. Convictions under statutes that lack an element necessary to the generic violent felony cannot be brought within the ACCA definition by use of the modified categorical approach.**

The elements of the prior conviction are, as the government concedes, central to the categorical and modified categorical approaches. (Resp. Br. 11, 30). Rather than address whether the elements of Mr. Descamps's prior California burglary conviction categorically fit the elements of "burglary" as used in 924(e), the government spends a considerable portion of its brief engaging arguments that Mr. Descamps has not made, matters that are not disputed, and issues that are neither necessary to, nor presented by, this case.

The government begins by changing the question presented. It then responds to unraised arguments regarding "judicially divisible" statutes, all while misreading this Court's precedent. The government's elision of elements and its emphasis on conduct begins early. It excises the word elements from the "Question Presented," asking instead whether the modified categorical approach can be used "when section 459 encompasses both offenses that are generic burglary under *Taylor v. United States*, 495 U.S. 575 (1990), as well as offenses that are not." (Compare Resp. Br. I with Pet. Br. I).

The government uses the term "offense" as if an offense can exist apart from its elements. It cannot. *Shepard v. United States*, 544 U.S. 13, 19 (2005) (statute focuses on elements, not conduct). Offenses exist only as they are defined. The way in which offenses are defined is

by elements – the matters that must be shown to obtain a conviction. Conduct beyond the elements occurs in almost every case, and may have even been admitted or not contested, but that conduct is not necessary to the offense of conviction. The government uses “offense” to embrace non-elemental conduct and facts underlying a specific conviction. It suggests that, because case-specific, non-elemental conduct might be said to establish a burglary offense under a generic elemental definition of burglary, a particular conviction under a statute that does not include those elements may qualify as burglary for ACCA purposes. This argument runs directly contrary to the plain language of § 924(e), which requires a “conviction” that “is burglary.” *Taylor*, 595 U.S. at 600. A conviction for the generic offense that is “burglary” contains an element of unlawful entry. When, as under the California statute, a conviction for burglary does not require that the elements of a generic burglary be proved, the modified categorical approach does not permit looking beyond the elements of conviction to conduct. The government cannot alter that legal reality by simply omitting the word “elements” from the discussion.

The government, while omitting “elements” from the question presented, does try to add them back in with its claim that statutes may contain “judicially divisible” elements. The government claims that Mr. Descamps argues that the modified categorical approach may be applied only to statutes that are textually divisible into alternative elements (Resp. Br. 9, 12), and not to statutes that are held by decisional law to set forth alternative elements for a crime. (Resp. Br. 10, 12). For fourteen pages, the government argues that judicial interpretations of state criminal statutes can create alternative elements



that could also be examined under the modified categorical approach. (Resp. Br. 17-30).

It may well be that decisional law holding that a statute contains alternative elements could bring the modified categorical approach into play. But there is no “judicially divisible statute” (Resp. Br. 28) in this case, and, in any event, Mr. Descamps has not argued that the modified categorical approach could never apply to such a statute. The government’s lengthy discussion of judicial divisibility draws attention away from the actual language of the California statute at issue, the elements of burglary under that statute and the case law interpreting it, and – most important – the proper boundaries of the modified categorical approach in assessing a non-divisible statute.

In *Taylor*, this Court interpreted the generic crime of burglary to mean a crime “having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” The Court found that this categorical, elemental approach is required by the ACCA. The statute has not changed. It remains true that “[t]he language imposing the categorical approach” “refers to predicate offenses not in terms of prior conduct, but of prior ‘convictions’ and ‘the element[s]’ of crimes.” *Shepard v. United States*, 544 U.S. 13, 19 (2005) (citing *Taylor*, 495 U.S. at 600-01 and 18 U.S.C. 924(e)).

The government concedes that the modified categorical approach does not apply when an offense is “‘missing altogether’ an element corresponding to an element of the generic crime.” (Resp. Br. 30; *see also* Resp. Br. 11). This is so because, when the element is missing, “then the defendant cannot have ‘necessarily admitted’ the generic

element,” and any “indication in the *Shepard* records” of the defendant’s actual conduct “would be outside of the proper scope of the sentencing court’s inquiry.” (Resp. Br. 30). The government also concedes that the Court’s precedents apply the modified categorical approach to statutes with alternative elements (Resp. Br. 17-19) – some of which constitute the generic offense at issue and some of which do not. (Pet. Br. 19-26 [*citing Taylor*, 495 U.S. at 578, 598-99, 602; *Shepard*, 544 U.S. at 17, 21; *Chambers v. United States*, 555 U.S. 122 (2009); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Johnson v. United States*, 130 S. Ct. 1265 (2010)]).

In spite of these significant concessions, however, the government insists that the modified categorical approach can be applied to California burglary. To reach that result, the government, with its arguments about judicial divisibility, blurs the line between the legal elements of an offense and the factual manner and means by which an offense is committed. This blurring permits conduct referenced in the *Shepard* documents to be considered, though it was not necessary to the conviction.<sup>1</sup> (Resp. Br. 19-30).

The government justifies this shift by pointing out that some statutes have been recognized by courts as divisible. (Resp. Br. 20). But there is a crucial difference between statutes that use alternate elements to define multiple offenses and those that set out a unitary offense

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1. Were the means of commission of an offense an element of the offense, it would need to be proved beyond a reasonable doubt. Generic unlawful entry is never required to be proved beyond a reasonable doubt to sustain a conviction for California burglary. See Section II, *infra*.

with a single set of elements.<sup>2</sup> For statutes that set forth multiple offenses with alternative elements, the modified categorical approach permits the ACCA sentencing court to determine which set of alternative elements formed the basis of the defendant's prior conviction.<sup>3</sup> The modified categorical approach does not permit statutes to be reinterpreted by the ACCA court to discern alternative elements that the convicting jurisdiction has not recognized. The government's argument would allow sentencing courts to rewrite a unitary element (*e.g.*, entry)

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2. The government attempts to blur this difference by arguing that, with a unitary offense, a court may discern and proclaim "no more than what the legislature might otherwise have stated explicitly." (Resp. Br. 23). This cannot be. In a statute with multiple, alternative elements a court simply recognizes what is there when it declares the offenses distinct; in a unitary statute, especially when, as the government would have it, a later sentencing court looks at a prior conviction and declares what might have been there, the court is adding matters that were not required for conviction.

3. Thus the Massachusetts simple assault and battery statute (*see* Resp. Br. 20), which simply codifies several common-law battery offenses, is divisible. That statute codified alternative elements of three offenses: (1) harmful battery; (2) offensive battery; and (3) reckless battery. Such a statute may be susceptible to application of the modified categorical approach, because the *Shepard* documents can be consulted to determine which "statutory phrase," or set of alternative elements, formed the basis of conviction. *United States v. Holloway*, 630 F.3d 252, 257 (1st Cir. 2011) (*citing Commonwealth v. Boyd*, 897 N.E.2d 71, 76 (Mass. App. Ct. 2008), review denied, 901 N.E.2d 137 (Mass. 2009)). In contrast, California burglary is a unitary offense with a single set of elements and, as defined, it lacks the generic element of unlawful entry. There may be many ways of committing California burglary, but there is only one set of elements.

into a series of “sub-elements” (*e.g.*, simple entry, unlawful or unprivileged entry, invasion of possessory interest, etc.) which really reflect nothing more than alternative factual means of proving the unitary element. In other words, the argument simply calls for application of the modified categorical approach to find facts – a result at odds with *Taylor* and *Shepard*. Such judicial fact-finding raises the constitutional concerns discussed in *Shepard v. United States*, 544 U.S. at 24 and *James v. United States*, 550 U.S. 192, 214 (2007).<sup>4</sup>

The government’s approach, contrary to its arguments, is also at odds with this Court’s decision in *Chambers v. United States*, 555 U.S. 122 (2009). (*See* Resp. Br. 21-22). *Chambers* does not allow the application of the modified categorical approach whenever conduct criminalized in a prior-conviction statute includes both conduct criminalized by the generic offense and non-generic conduct. Rather, the Court held that a statute that criminalized multiple escape and failure to report offenses with alternative elements was subject to the modified categorical approach. Thus, the *Chambers* Court retained the focus on determining which set of alternative elements, and thus which discrete offense, was necessarily admitted. *Chambers*, 555 U.S. at 126-30.

**II. The modified categorical approach does not apply to California Penal Code § 459, which contains a unitary entry element and is missing an element of generic burglary.**

The statutory text of California Penal Code § 459 establishes no entry element beyond entry *simpliciter*.

---

4. *See also* Pet. Br. 13, 29-33.

The statute provides that “every person who enters any house, room, apartment...” “with intent to commit grand or petit larceny” is guilty of burglary.<sup>5</sup> The text of the statute is missing an element of generic burglary – unlawful or unprivileged entry into a building or structure. *See Taylor*, 495 U.S. at 599. A conviction for California burglary is therefore not a conviction for “burglary” as the term is used in § 924(e), and as burglary is determined using the categorical approach.

The government ventures that, despite the lack of the required unlawful-entry element, a conviction for California burglary can be a § 924(e) burglary conviction because a California case, in holding that one cannot burglarize his own home, stated that entry must invade a possessory interest. (Resp. Br. at 23, 36-37 (citing *People v. Gauze*, 542 P.2d 1365 (Cal. 1975))). The government is incorrect. *Gauze*’s “invasion of a possessory interest” is not the same thing as unlawful entry. The California Supreme court made that clear in a case that followed

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5. For examples of California burglaries that demonstrate the lack of any generic unlawful-entry element, *see, e.g., People v. Nguyen*, 40 Cal. App. 4th 28 (Cal. Ct. App. 1995) (entering a dwelling with the intent to steal property by giving the victim a worthless check in exchange for various items); *People v. Felix*, 23 Cal. App. 4th 1385 (Cal. Ct. App. 1994) (brother had sister’s implied consent to enter her home); *People v. Pearson*, No. B225375, 2011 WL 5429497 (Cal. Ct. App. Nov. 9, 2011) (entering a bank intending to cash bad checks); *People v. Dowlatsahi*, No. B205068, 2009 WL 2961937 (Cal. Ct. App. Sept. 17, 2009) (consensual entry into the victim’s home intending to engage in a counterfeit money and theft scheme); *People v. Balestreri*, No. H030622, 2007 WL 4792846 (Cal. Ct. App. Dec. 18, 2007) (attending an open house with the intent to obtain cash from the real estate agent under false pretenses).



*Gauze*, by specifically ruling that “one may be convicted of burglary even if he enters with consent[.]” *People v. Pendleton*, 25 Cal.3d 371, 382 (1979). The *Pendleton* Court stated explicitly that *Gauze* had answered only the narrow question whether a defendant could be guilty of burglarizing his own home, and did not overrule existing precedent regarding the unlawful-entry element. *Id.* at 382. *Gauze* simply did not rewrite the elements of California burglary.

But one need look no further than *Gauze* itself to understand its reach and import. *Gauze* held that a defendant cannot be convicted of burglarizing his own home. But the California Supreme Court did not impute an element of unlawful entry, in the *Taylor* sense, into the California burglary statute. Indeed, *Gauze* made clear that generic unlawful entry is not an element of California burglary:

The elimination of the breaking requirement was further interpreted in *People v. Barry* (1892) 94 Cal. 481, 29 P. 1026, to mean that trespassory entry was no longer a necessary element of burglary. In *Barry*, this court held a person could be convicted of burglary of a store even though he entered during regular business hours. A long line of cases has followed the *Barry* holding.

*Gauze*, 542 P.2d at 1367 (citing cases). *Gauze*’s discussion of an invasion of a possessory interest was specific to the question of whether one could be convicted under the statute of burglarizing his own home. *Gauze* never indicated that generic unlawful entry in general is an



element of California burglary.<sup>6</sup> See *Pendleton*, 25 Cal.3d at 382 (lawful, consensual entry is sufficient to prove the only entry element for California burglary).

Assuming, *arguendo*, that “invasion of possessory interest” is an element, it is not the generic element of “unlawful or unprivileged” entry. Satisfaction of the elements of California burglary offense will never necessarily satisfy the elements of generic burglary, because the fact-finder is never necessarily required to find an unlawful entry sufficient to satisfy *Taylor*. “Unlawful or unprivileged” entry is one of an infinite number of means for committing an “invasion of possessory interest,” but it is never a required element to convict. Jurors are not instructed on any unlawful or unprivileged entry element pursuant to California’s pattern jury instructions. See CALCRIM 1700.<sup>7</sup>

California Penal Code § 459 contains an unadorned, unitary entry requirement with no alternative elements.

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6. In *People v. Sherow*, 128 Cal. Rptr. 3d 255, 266 (Cal. Ct. App. 2011), the court explained that consent to enter, and the related issue of invasion of a possessory right, is not an element but was instead an affirmative defense. California case law has thus developed a consent *defense* to burglary *People v. Felix*, 28 Cal.Rptr.2d 860 (Cal. Ct. App. (1994)).

7. See [http://www.courts.ca.gov/partners/documents/calcrim\\_juryins.pdf](http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf), CALCRIM 1700. “The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California.” 2012 California Rules of Court, Rule 2.1050(a). “The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law.” 2012 California Rules of Court, Rule 2.1050(b).

The modified categorical approach does not apply to that offense, as that analysis asks which statutory phrase, or alternative element, formed the basis of the conviction. Since the statutory phrase forming the basis of Mr. Descamps's conviction was simple entry, the unlawful-entry element identified in *Taylor* is missing. The offense is therefore not burglary within the meaning of § 924(e).

The government concedes that the “invasion of a possessory right” element is not a categorical match to *Taylor*'s unlawful-entry element. (Resp. Br. 38). The government argues, however that “invasion of possessory interest” can be demonstrated by certain means that would satisfy the generic “unlawful” entry, thus allowing for application of the modified categorical approach. (Resp. Br. 38). As Mr. Descamps argued above, this argument conflates the factual means of committing an offense with its elements. Alternative means of committing an offense, and underlying facts, are not the equivalent of elements. *See* Section I, *ante*. There is but one unitary element of entry against a possessory interest, with no alternative elements to analyze under the modified categorical approach. That California may have some qualification to its entry element does not change the fact that generic unlawful entry is never an element of California burglary.

The government's suggestion that a California burglary could involve unlawful entry – though that would never be an element of the offense – and thus could be burglary within the meaning of § 924(e) cannot be reconciled with *Johnson v. United States*, 130 S.Ct. 1265 (2010). In *Johnson*, this Court applied the modified categorical approach to a Florida statute that contained alternative elements to decide whether the defendant's

battery conviction was a “violent felony” under the “force” clause of § 924(e). One section of the Florida statute criminalized intentionally striking another (which had an element of “violent force”), while another section prohibited the actual or intentional touching of another (which did not). *Id.* at 1269. The Court held that the modified categorical approach could be used “to determine *which statutory phrase* was the basis for the conviction by consulting the trial record...” *Id.* at 1273 (emphasis added).

In *Johnson*, the Court looked to the alternative elements, and no further. Once the Court concluded that the “offensive touching” portion of the Florida battery statute lacked the required “violent force” element defined by the ACCA, its inquiry ceased. *Id.* at 1269. It ceased despite the fact that the “offensive touching” element could be committed in many different ways – including through the use of “violent force.” The Court did not authorize the government’s approach here – going beyond the elements to the actual conduct underlying the offense or to the manner and means alleged. *Johnson* simply clarifies, yet again, that a unitary element cannot be broken down into alternative elements based on different factual methods for committing the offense.

The only entry element required for conviction of burglary in California is simple entry, which may be lawful entry. The § 924(e) inquiry ends with the delineation of the element. Because “burglary” as used in § 924(e) requires unlawful entry, and burglary under California law does not, a California burglary cannot serve as a predicate conviction for enhancing a defendant’s sentence under § 924.

### **III. Expansion of the modified categorical approach would cause increased litigation while undermining certainty.**

Recasting the elements of an offense constitutes a significant expansion of the modified categorical approach – as does allowing inquiry into the facts and conduct behind a prior conviction, rather than into the recognized elements of the offense. Neither expansion finds support in this Court’s precedent (Pet. Br. 19-26), and each is inconsistent with the ACCA and its legislative history. Congress certainly did not intend to permit federal sentencing courts to repeatedly examine the myriad applications of a State statute in an effort to divine unenumerated “elements” that are, in actuality, merely various manners and means of committing the offense.<sup>8</sup> Under the government’s approach, every state court opinion endorsing a conviction based on a particular means of committing an offense potentially leads to the

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8. The government’s fact-intensive inquiry would prove extremely burdensome. California prosecutes well over 200,000 cases of burglary each year. State of California Department of Justice, Office of the Attorney General, Table 2: Supplemental Detail For Selected Crimes 2001-2010, *available at* <http://oag.ca.gov/sites/all/files/pdfs/cjsc/prof10/2/00.pdf>. Nearly 40 percent of these cases do not involve any force at all, raising the prospect that California prosecutes thousands of cases of burglary in which the offender lawfully entered the structure with the victim’s consent. Other states broadly define burglary to encompass privileged entries. *See, e.g.*, Idaho Penal Code § 18-1401; Nev. Penal Code § 205.060. Considering the frequency of burglary convictions nationwide, and the number of such convictions which do not involve the generic unlawful-entry element, the frequency and intensity of modified categorical approach litigation would increase exponentially under the government’s approach.

recognition of new or different elements of a statute, opening the door to endless litigation over what constitutes the elements of an offense. That approach is rightfully alien to the law. While federal sentencing courts properly examine state law to discern the actual, recognized elements of an offense, they ought not – and, practically speaking, cannot – embark on wholesale reassessments of what constitutes an element by looking at every state court factual application of the law.

As noted in Petitioner's brief, the government's approach also undermines the certainty required by *Taylor*. Defendants have no incentive to contest or correct factual recitations that do not go to the elements of the offense or to the authorized punishment for the offense at hand. (Pet. Br. 33-35). The government concedes this point, but marginalizes it as a "theoretical concern" that arises under any view of the modified categorical approach, and that in any event has not "proven problematic in practice." (Resp. Br. 34). But the modified categorical approach, properly limited to the determination of which set of alternative elements the defendant was convicted under, raises no reliability concern because the defendant has every incentive to contest a fact going to the element of an offense. And the government's blithe assurance that the problem does not frequently arise is unwarranted – the disincentive to quarrel about facts immaterial to guilt or the authorized punishment for the offense at hand is ever present.

Mr. Descamps' California burglary conviction demonstrates the point. Whether or not Mr. Descamps broke into the supermarket that he was accused of burglarizing was irrelevant to his conviction or authorized



punishment. Since unlawful entry is not an element of California burglary, he could not defend against that offense, by claiming, for example, that he had not actually broken into the supermarket, but had instead walked in just as the supermarket was closing. Such a defense was futile, since entering the supermarket under any circumstances with the intent to commit theft satisfies the elements of California burglary. The prosecutor's extraneous statement that this offense involved "breaking and entering" did not establish any element of the offense, and there was no incentive to contest it.

The government's position would allow for the application of the modified categorical approach to virtually any felony offense. Typically non-violent convictions such as theft, shoplifting, trespass, and destruction of property would be subject to the modified categorical approach based on the possibility that they were coupled with a "violent" act. (See Pet. Br. 27-28). That approach erroneously proceeds with an examination of the *Shepard* documents to determine the underlying "basis of conviction." See *United States v. Beardsley*, 691 F.3d 252, 272 (2d Cir. 2012). Universal application of the modified categorical approach violates the principle that it only applies in the "narrow range of cases where a jury was actually required to find all the elements of generic burglary." *Taylor*, 495 U.S. at 602.

This Court anticipated precisely the government's position – requiring a federal sentencing court retrospectively to piece together the prosecution's theory of the case, and the underlying facts, in the prior conviction – as a potential source of "practical difficulties and potential unfairness." See *Taylor*, 495 U.S. at 601.



This Court also foresaw the government's argument for expanding the ACCA analysis in the name of uniformity (Resp. Br. 25), and rejected it as a "call to ease away from the *Taylor* conclusion, that respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State." *Shepard*, 544 U.S. at 23. Any approach that approves a recasting of elements of a prior-conviction offense, or the determination of underlying facts and conduct, renders the results of the inquiry less, not more, certain. The Court has consistently rejected the government's invitations to back away from *Taylor*, and should do so again.

## CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed, and the case remanded to the court of appeals with instructions to remand to the district court for resentencing.

Respectfully submitted,

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*Counsel for Petitioner*

# **SUPPLEMENTAL BRIEF**

ORIGINAL

Supreme Court, U.S.  
FILED

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910 PAGE 57

11-9540

I swear under penalty  
of perjury I mailed  
a true copy of  
page 1<sup>st</sup> and page 2<sup>nd</sup>

Statement of Supplemental  
Brief and a

Supplemental Brief to  
the U.S. Supreme Court at  
1 First Street Washington D.C. 20543

Statement of unconstitutionality  
and a notice and statement  
only of me filing a  
supplemental brief to

**SUPPLEMENTAL** Statements of  
U.S. Department of Justice  
Donald B. Verrilli, Jr.

Solicitor General 950  
Pennsylvania Ave N.W. Svt  
Washington D.C. 20530-0001

~~Statement of unconstitutionality~~  
~~An notice of a supplemental Brief~~

to Attorney General of Washington  
Rob McKenna 1125 -  
Washington St SE Pobox 40100  
Olympic WA. 98504 0100

Matthew Deslamps

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NO. 11 9540

SUPREME COURT OF THE UNITED STATES

Statement of  
Unconstitutionality and Misrepresentation of an attorney that involves unlawfully and Illegally arrested with Falsification and Fraudulent deception for unlawful gain in violation of 18 U.S.C. 1001, violation of my State custody taken out of state custody in the violations of the Laws of the United States, The Tenth Amendment, Due process clause, The separation of powers clause, Impermissible interference with State sovereignty with disregard to Federal structure of our Government.

I've been  
Assaulted by Guards and then  
interrogated in violation  
of Miranda V. Arizona

7/17/12

Matthew Descamps  
PO Box 1000  
Lewisburg PA 17837



SUPREME COURT OF THE UNITED STATES

MATTHEW R DESCAMPS

Statements

United States

SUPPLEMENTAL

BRIEF

COMES NOW :

Matthew Robert Descamps with a declaration in compliance with; 28 U. S. C. § 1746, THAT; under penalty of perjury that the foregoing is true and correct that any and all papers I've ever filed in any U. S. COURT IS True and correct . . . .

That I'm sending a Supplemental Brief that I Tried to file in the Ninth Circuit Court of Appeals That I am now trying to file in the United States SUPREME COURT.

PLEASE USE THIS FOR THE COVER FOR MY BRIEF TO THE SUPREME COURT



# SUPREME COURT OF THE UNITED STATES

#11175085  
MATTHEW R. DESCAMPS

no: 11 9540

✓  
UNITED STATES

Supplemental brief  
Statements

With Misrepresentation of an  
Attorney (S) from state court to  
Federal COURT . . . and in  
Federal COURT

I the petitioner :  
Matthew R Descamps was arrested  
Unlawfully and Illegally with  
Falsification and Fraudulent  
deception for unlawful gain

(That caused my father to have a  
heart attack and die.)

in violation 18 U.S.C. 1001,  
Assaulted in State custody and  
taken out of state custody  
in violation of the Laws  
of The United States of America

Please See :

Carol Anne Bond V. United States,  
131 S.Ct. 2355; 180 LEd 2d 269;

**SUPREME COURT OF THE UNITED STATES  
OFFICE OF THE CLERK  
WASHINGTON, DC 20543-0001**

MATTHEW ROBERT DESCAMPS,

Plaintiff - Appellant,

v.

UNITED STATES

Defendant - Appellee.

no. 11-9540

**SUPPLEMENTAL BRIEF**

Matthew R. Descamps  
#11175085  
P.O.Box 1000  
Lewisburg, PA 17837

Plaintiff

~~██████████~~ - Appellant, was arrested the first time, 3/25/05 in Stevens County, Washington

for first degree assault with a dangerous weapon, a firearm, placing a \$250.000 bail, after being booked in the jail...(please take note there was no conversation what so ever, there was no papers that I signed of any so called bullet found in my pocket). Question being why did I not have to sign a property slip or something when I was booked in the jail. With this Question and problem it was not brought to my attention until 3-1/2 years after I was booked in Stevens Co. Jail. Just before trial, after I was so call found competent. Going back to when I was first arrested placing a \$250.000 bail being also placed in a cell away from all other inmates in the jail can see the door and inside the cell I'm in when the doors open,. The reason why I'm stating this is that I was assaulted, and assaulted several times on different occasions.

I complained to my attorney at which time he took pictures, photographs etc.

I asked him to file a writ of Habeas Corpus and a 1983 basis of being arrested on false charges and beaten up in jail

ONLY WITH REAL FINALITY can the victims of crime move forward knowing the moral judgment will be carried out

PAYNE -V-TENNESSEE, 501 US 808, 115 LEd 2d720, 111 SCt 2597 (1991)  
It was never carried out. State dismissed calling into question the very legitimacy of the judgment.

HAZEL-ATLAS GLASS CO.-V-HARTFORD EMPIRE CO. 322 US238, 88 LEd 1250 64 SCt997 (1944)

This moral judgment was never carried out. Appellant was assaulted by correction officers in Stevens Co. Jail (TIME AFTER TIME)

Superior Court Judge Baker told the correction officers to put me in restraints, a chair to bring me before her. I fought correction officers for over 20 minutes where other inmates could and did see the officers gave up and said to me "we'll just walk you up" they did and everything went fine.

This Hon. Judge Baker is the same Judge that new of and reviewed me and sent me to Eastern State

Hospital to be evaluated for competence in, and for, the case that the Hon Fred Van Sickle used as a predicate for a CCA in my current case.

Case No .00-1-00032-7 in the Superior Court of the State of Washington in and for the County of Pend Oreille, Felony Harassment 46-020 (1) (a) by Alford plea

Please take note and understand when I was in Fend Oreille Jail going to trial for felony harassment

on a judge I filed a 1983 against the prosecuting attorney and the judge for pressing charges on me

for threatening a judge. I did not threaten a judge, I told him he was a take it in the ass dick. Licking

Homo Sexual and if he and the prosecutor would quite sucking each others dicks we might get something done in this town. I went on for a long time, very disrespectfully, and Appellant Please asks the reviewing court to except my apology and expression of regret for a formal justification or defense. Furthermore I was arrested at a show cause hearing for threatening a judge when all it really was, was a contempt of court.

So now when I filed a 1983 in the U.S.D.C. EDWA the Honorable Fred Van Sickle wanted to dismiss my 1983 and terminate it. I argued this and had the Hon. Van Sickle step down and recuse himself. Not only did I have him recuse himself I had him recuse himself before, on another

1983 in Stevens County. I filed against the chief head jailer. Again, another time I had the Hon Fred Van Sickle step down and recuse himself the time in Stevens Co. is the first time I had him recuse himself but the second time was in Pend Oreille, I do not know how to explain I had two civil suits at this time I did have the Hon. Fred Van Sickle step down from one of these and it went on to just one civil suit. Descamps -V- VanDeVeer, et al., case cv-00 218 aam

Where this judge wanted to dismiss and I took it to the ninth cir., and the ninth cir still wanted to dismiss So I took it to the Supreme Court and it was being heard because I did not threaten a judge. I was rude, impolite and discourteous but, I did not threaten a judge.

Not only have I had the presiding judge recuse himself two times in my life time because he was bias and prejudiced against me. I brought motions to the courtroom asking him to recuse himself which he unjustly and wrongfully did not have the motions put on my Docket text.

Lets go back to when I first was arrested on March 25th. 2005. DEA agent Andy Caster came to talk to me with Capt. George of the Stevens Co. Sheriffs. I told them I had nothing to say

without my attorney. REVIEWING COURT please take note this is a Federal Officer I told this to before ATF agent. In the presence of the Captain of Police of Stevens County Sheriffs.

My \$250,000 Dollar bail was reduced to \$5000.00 Dollars where I the Defendant had already signed a summons by the Hon. Cynthia Imbrogno days before I ever bailed out. Defendant feels I had already signed a summons...What is "appropriate" in the circumstances 99 U.S. 700, 718, 25 Led 496 (1870)

**\*FAIRNESS AND JUSTICE\***

State -V- Starrish, 86 Wn2d200, 544P2d1 (1975)

State -V- Dailey 93 Wn2d454, 610P2d35 (1980)

State -V- Sonnelandm 80 Wn2d343, 494 P2d469 (1972)

Now the charges where Dismissed in the State.

The Defendant has a standing objection

State -V- Blanchey 75 Wn2d926, 454P2d841 (1969)

(IF) there is any question about the lawfulness of the arrest or the method by which he was brought before "the Court"

State -V- Blanchey 75 Wn2d926, 454P2d926, 454, P2d841 (1969). Court did not review

The record for evidence of probable cause.

Statement of objection to brief for Appellee.

On page 2.B course of proceedings and disposition in the court below

That on Line 12, 13 and 14 Possession of a Firearm in violation of 18 USC SS SS

922(g) (1) and 924 was reported to have occurred on March 25, 2005

PROBABLE CAUSE Wong Sun -V- United States 371 U.S. 471 (1963)

The Fourth Amendment provides that "No warrants shall issue, but upon probable cause".

Spinelli -V- United States and Illinois -V- Gates reflect Supreme Courts

"totality of the circumstances" test.

One argument in this case, is that when the case in Stevens Co. Wa. was dismissed and

The United States picked it up by filing charges that the authorities had already known

I was competent to go to trial so why did it take 3 ½ years to go to trial

#### THE DUTY TO DISCLOSE

In order to make the criminal trial. "Less a game of blind mans bluff and more a fair

Contest with the basic issues and facts disclosed to the fullest practical extent"

United States –V- Proctor & Gamble Co., 356 U.S. 677 (1958)

What the states provide in the way of defense discovery is basically a matter of state choice.

The Supreme Court had noted on several occasions that "there is no general constitutional right to discovery in a criminal case"

Weatherford –V- Bursey, 429 U.S. 545 (1977) But the Defendant – Appellant was tried

And sentenced under the Brady –V- Maryland 373 U.S. 83 (1963)

#### THE SECOND ARREST OUT ON BAIL. IS TO VIOLATE DUE PROCESS NOTIONS OF FUNDAMENTAL FAIRNESS

Washington Court of Appeals, State –V- Clark 34 Wn App. 173, 659, P2d (1983)

#### CONSTITUTIONAL VIOLATIONS of the "(AMENDMENT)"

State –V- Garza, Wn. App. 291, 994 P2d 868 (2000) Right to effective assistance of Counsel, Presumption "of" Prejudice establishing a CONSTITUTIONAL VIOLATION

State –V- Prok Wn 2d153 727 P2d 652 (1986)

THAT SUBSTANTIAL JUSTICE HAS NOT BEEN DONE and violations of the element Of "DUE PROCESS OF LAW"

Wright –V- State of Ga. 373 U.S. 284, 83 S.Ct. 1240 10 Led 2d 349 (1963)

Connally –V- General Const. Co, 269 U.S. 385 46 S.Ct 126 70 Led 322 (1926)

Arrest of April 29<sup>th</sup>, 2005 "FRUIT" of illegal seizure

United States –V- Rosen (1972 S.D. New York) 343 Federal Supplement 804,

THE PURPOSE OF U.S.C.S. 55 is to protect governmental functions from

Frustration and distortion through



## DECEPTIVE PRACTICES

People -V- Waterman 9 N.Y. 2d 561,565, 175 N.E. 2d 445, 448

## DICTATES OF FAIRNESS

Affecting Governmental immunity in Federal Court 12 Led 2d 1110

## OBSTRUCTION OF JUSTICE

SS 1505 obstruction of proceedings before departments agencies and committees.

## FALSE OR FRAUDULENT PRETENSES REPRESENTATIONS

( Shall be guilty of a crime)

Shift from state to a federal evidence, such as a statement is a VINDICTIVE MOTIVE

United States -V- Goodwin 457 U.S. 368, 380-81 and N N. 12 384 and N 19, 102 S.Ct 2485, 73 Led 2d74 (1982)

## (INVALID WARRANTS)

Violates rule 4. United States -V- Hughes (1962 W D Pa.) 201 F Supp-615  
Revd on other grounds (1962 Ca. 3 Pa) 311 F 2d 845.

REARREST WITHOUT issuance of new warrant after release on bail was invalid  
Exparte Sentner ( 1950 D.C. Mo 94 F Supp77)

The second arrest out on bail is UNREASONABLE arbitrary abuse of discretion.

Any "unreasonable unconscionable (or) arbitrary action taken WITHOUT proper

Consideration of the facts and law pertaining to the matter submitted" 458 P. 2d 336, 338

Basis of fraud or mistake to require to investigate the accuracy of the information provided.

Couch, Cyclopedia of Insurance Law SS 72.1 ( 2d ed. 1983).

Defendant wishes to contest the statement of Bureau of Alcohol Tobacco Firearms and

Explosives (ATF) subscribed and swore a criminal complaint.

## THE USE OF NON JUDICIAL FACTS

In a Constitutional Law context, judicial review expresses the concept first articulate in

Marbury -V- Madison, 5 US (1 Cranch) 137 (1803)

Under this doctrine the U.S. Supreme Court and the highest court of every state have

Assumed the power and responsibility to decide the constitutionality of the acts of the

Legislative and executive branches of their respective jurisdictions.

## WHAT

Constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake.

People –V- Donovan, 193 N.E. 2d 628 (N.Y. 1963) (Fuid,J).

As from the first day of arrest March 25<sup>th</sup>. 2005 I have complained of dissatisfaction or resentment to make a formal accusation.

## MISREPRESENTATION

### 1. IN MY CIVIL SUIT AND

### 2. MY WRIT OF HABEAS CORPUS

1. Case 2:07-cv-00121EFS Descamps –V- Bush et.al.

U.S.D.C. EDWA Filed 05/10/2007

C Document 2

2. Case no., 06-3320-CV-S-FJG-H Descamps –V- McFadden, et.al.,

U.S.D.C. WD OF Mo. Filed 08/18/2006

More ineffective assistance at trial and unconstitutionality by trial Judge Honorable

Fred Van Sickle. "without seeing all the evidence, any more than one can tell

Whether-a-fraction is more or less than half by looking only at the numerator and

Not the denominator"

Bismullah –V- Gates No,06-1197 (D.C.Cir. Feb 1, 2008

Brown –V- Mississippi (1936) The first Fourteenth Amendment Due Process case, and Miranda had the Fifth Amendment.

Malloy –V- Hogan, 378 U.S. 1 (1964) Malloy not only held the self-incrimination clause Applicable to the states, but declared that whenever a question arises in a state or Federal court "whether a confession is incompetent because not voluntary, the issue is Controlled by (the self-incrimination) portion of the Fifth Amendment".

Did the officers undertake to afford appropriate safeguards at the outset of the

Interrogation to insure that the statements were truly the product of free choice.

"Without unnecessary delay" In (the McNabb and Mallory cases) we recognized both the

Dangers of interrogation and the appropriateness of prophylaxis stemming from the very

fact of interrogation itself.

As (in Escobedo) I MATTHEW ROBERT DESCAMPS,

They denied my request for the assistance of counsel.

(T)he miscarriage of justice exception is concerned with actual as compared to  
Legal innocence.

Sawyer, 505 U.S., at 339, 120 LEd 2d 269, 112 SCt 2514

"To be credible" a claim of actual innocence must be based on reliable evidence not  
presented at trial.

Schlop -V- Delo, 513 US 298, 324, 130 LEd 2d 808, 115 SCt 851 (1995)

Petitioner, Defendant, challenges the Constitutionality, of his second arrest 4/29/05.

Hon. Cynthia Imbrogno arrest warrant was based upon falsification and fraudulently

Used in obtaining a warrant. Constitutional challenges to establish guilt beyond a

Reasonable doubt.

In re Winship, 397 U.S. 35 (1970) "whose interest in criminal prosecution is not  
that it shall win the case, but that justice shall be done".

Berger -V- United States, 295 U.S. 78 (1935) Furthermore, in addition argued that  
Letting the Government withhold information about the detainees from their Lawyers  
and the Court "would render utterly meaningless judicial review"

As Defendants

Civil suit at time of trial and his Writ of HABEAS CORPUS

Matthew Descamps  
Pobox 1000 Lewisburg, PA.  
17837

Signed and  
dated

July 17-2012

x 

**AMICUS  
CURIAE  
BRIEF**

IN THE  
**Supreme Court of the United States**

OCT 31 2012

OFFICE OF THE CLERK

MATTHEW ROBERT DESCAMPS,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

On a Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

**BRIEF FOR AMICI CURIAE  
NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS AND  
NATIONAL ASSOCIATION OF  
FEDERAL DEFENDERS  
IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of a crime or wrongdoing.<sup>1</sup> A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries – and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it representation in the ABA's House of Delegates.

NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving federal sentence enhancements. In furtherance of

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<sup>1</sup> Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this brief.

this and its other objectives, NACDL files approximately 50 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. The NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. Among the NAFD's guiding principles is its commitment to promote fair adjudication in criminal matters by appearing as *amicus curiae* in cases of significant and recurring importance to indigent defendants.

Both *amici* have a particular interest in this case because rules recently adopted by the Ninth Circuit would dramatically alter how federal judges apply sentence enhancements. This implicates not only the rights of the criminal defendants amici's members represent, but also the ability of those members to provide accurate advice about the consequences of convictions.



## STATEMENT OF THE CASE

A federal court sentenced petitioner to more than twenty years in prison for being a felon in possession of a firearm. More than half of that sentence resulted from the trial court's conclusion that a 1978 conviction in California constituted "burglary" for the purposes of imposing a sentence enhancement under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). On appeal, the United States Court of Appeals for the Ninth Circuit acknowledged that the California statute of conviction encompassed more conduct than the federal definition of "burglary," and that imposing the sentence enhancement would contravene the categorical approach established by this Court for applying the ACCA. But even as it conceded that the categorical approach precludes an examination of the facts underlying a particular conviction, the court of appeals read this Court's "modified" categorical approach decisions to permit precisely that fact-specific inquiry. Applying that approach, the Ninth Circuit upheld the ACCA enhancement on the ground that the facts underlying petitioner's state conviction – as allegedly admitted by petitioner in his plea colloquy – would have supported a conviction for burglary under the federal definition.

1. Petitioner Matthew Descamps was convicted in federal court of being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). Pet. App. 6. The statutory maximum sentence for this offense is ten years' imprisonment. 18 U.S.C. § 924(a)(2). The Government sought a sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e), which requires a

minimum sentence of fifteen years for a defendant who “has three previous convictions . . . for a violent felony or a serious drug offense,” *id.* § 924(e)(1).

The term “violent felony” includes a conviction for “burglary” that is “punishable by imprisonment for a term exceeding one year.” 18 U.S.C. § 924(e)(2)(B). In *Taylor v. United States*, 495 U.S. 575 (1990), this Court held that the term “burglary” in the ACCA refers to a “generic” federal crime of burglary rather than to the state of conviction’s definition of that offense. *Id.* at 599. As articulated by the Court, generic federal burglary is defined as the “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” *Id.*

The Government argued that Descamps qualified for a sentence enhancement because he had been convicted of three violent felonies, one of which was a 1978 burglary conviction in California. Descamps argued, among other things, that the 1978 conviction did not constitute a violent felony because the California burglary statute does not contain the element of “unlawful entry” necessary to the federal offense. The judge, however, found that regardless of the elements of the state offense, Descamps’ entry had been unlawful, pointing to a passage from the transcript of the 1978 plea colloquy that read:

The Court: Is there a factual basis for the entry of the plea of guilty, Mr. Tauman?

Mr. Tauman [Descamps’ attorney]: There is a factual basis.

Court: Do you concur with that, Mr. DeSilva?

Mr. DeSilva [state prosecutor]: Yes, Your Honor.

Court: In substance, what does this involve?

Mr. DeSilva: This involves the breaking and entering of a grocery store.

Pet. App. 40. Relying on the fact that Descamps did not object to the state prosecutor's characterization of his conduct as "breaking and entering" – a characterization irrelevant to the state charge – the federal trial judge determined that Descamps had confessed to "unlawful entry." Pet. App. 9. The trial court therefore held that the California burglary conviction amounted to Descamps' third predicate felony, and that an ACCA enhancement was warranted.

The court sentenced Descamps to more than twenty-one years in custody and five years of supervised release. Pet. App. 27. As a result, the ACCA enhancement more than doubled the sentence petitioner otherwise would have received.

2. Descamps appealed his sentence on the grounds that, regardless of the prosecutor's remarks during his plea colloquy, the California conviction could not serve as an ACCA predicate because it contained no element of unlawful entry. Relying on its decision in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), the Ninth Circuit concluded that the sentencing court was permitted to find the missing element based on the plea colloquy and affirmed the sentence. Pet. App. 4.

## SUMMARY OF ARGUMENT

I. In *Taylor v. United States*, 495 U.S. 575 (1990), this Court established a categorical approach for determining whether a defendant's prior conviction qualifies as an ACCA predicate crime. Under this approach, a sentencing judge looks only to the statutory definition of the prior offense and asks whether the elements of that crime constitute an ACCA predicate offense. This Court has permitted a "modification" of the categorical approach when a statute encompasses several different crimes with different elements, some of which qualify as ACCA predicate offenses, and some of which do not. In this "narrow range of cases," a judge may look to certain documents to determine which of the possible statutory violations was the basis of the conviction. *Id.* at 602.

In *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), the Ninth Circuit revised the Court's traditional modified categorical approach in two respects. First, it extended the approach to a new type of statute. Previously, this Court had only applied the approach to so-called "divisible" statutes that define multiple offenses with alternative elements. But the Ninth Circuit extended the approach to statutes that are altogether missing an element of the ACCA predicate offense. That innovation required the second revision: Rather than looking to the record of conviction simply to identify which particular offense was the basis of the conviction, the Ninth Circuit authorized courts to examine "to some degree the factual basis" underlying the conviction to decide whether the defendant would have been convicted of the ACCA

predicate offense had he been tried under the federal definition. *Id.* at 935.

II. These revisions to the modified categorical approach contravene this Court's precedent and the text of the ACCA, render the statute unconstitutional as applied in many cases, and will make administration of the ACCA even more difficult and unfair than it already is.

A. The Ninth Circuit's version of the modified categorical approach does exactly what this Court's categorical approach precedents endeavor to prevent – it requires courts to examine the facts and evidence underlying a specific conviction to decide whether those facts would support a conviction in a hypothetical prosecution for the ACCA predicate offense. The Ninth Circuit recognized as much, but understood the Court's modified categorical approach to be less of a modification than an exception, permitting courts to undertake essentially the opposite of the categorical approach in appropriate cases. That misreads precedent. The modified categorical approach is, as its name implies, a modest modification to the general approach this Court has designed to implement the ACCA. It simply allows courts to examine the record of conviction to determine – in cases where the statute of conviction defines multiple offenses with alternative elements – *which* offense the defendant was actually convicted of. It is not a license to conduct a factual inquiry to decide the results of a hypothetical prosecution that never took place, under a state statute that does not exist.

B. The Ninth Circuit's contrary approach cannot be reconciled with the text of the ACCA. The ACCA



applies to a person who “has three previous convictions’ for – not a person who has committed – three previous violent felonies or drug offenses.” *Taylor*, 495 U.S. at 600 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). Even if the record revealed that petitioner had admitted to facts that would have led to a conviction for generic burglary had he actually been tried for that offense, that simply is not the same thing as actually being convicted of generic burglary. A defendant who is caught breaking into a house to steal a television, but is only charged with trespass, is not convicted of burglary even if the jury necessarily finds, or the defendant admits to, facts that would have supported a conviction for the more serious offense.

C. The Ninth Circuit’s rule would also result in Sixth Amendment violations in a great many cases. Any fact, other than the fact of a prior conviction, that increases a defendant’s maximum sentence must be found by a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The narrow exception for the fact of a prior conviction does not authorize a federal sentencing court to impose a greater sentence based on his finding that a jury would have found a missing (and unnecessary) element had it been asked to do so.

D. This Court has recognized that allowing sentencing judges to examine the factual background of prior convictions would create “practical difficulties and potential unfairness.” *Taylor*, 495 U.S. at 601. The Ninth Circuit’s rule would be challenging to administer, as courts would have to determine the veracity and import of evidence that did not relate to elements of the charged offense. Because the



defendant would have had little incentive to contest such evidence, it would be inherently unreliable. Moreover, allowing a sentencing judge to reexamine the factual basis for a guilty plea risks unfairness. Defendants and prosecutors often agree to plea bargains under which the defendant pleads guilty to less serious offenses. Treating those convictions, for federal sentencing purposes, as convictions for more serious offenses strips the defendant of the benefit of his bargain and interferes with the state's prosecutorial discretion.

E. The Ninth Circuit justified its rule in part on the ground that there is no logical difference between a statute that lists multiple crimes containing alternative elements (which all agree is subject to the modified categorical approach) and a statute that is missing an element altogether. That assertion is wrong, but even if it were correct, that would be reason to abandon the modified categorical approach, not to expand it.

**ARGUMENT****I. The Ninth Circuit Construed This Court's "Modified Categorical Approach" To Permit A Dramatic Exception To The Categorical Approach's Limited Elements-Based Inquiry.****A. The Categorical Approach Is Limited To Examination Of The Elements Of The Prior Statute Of Conviction.**

This Court has established a "categorical approach" to determine whether state convictions trigger sentence enhancements under the ACCA and certain other federal statutes. *See Taylor v. United States*, 495 U.S. 575, 600 (1990). Under this approach, sentencing courts compare the elements of the federal ACCA predicate offense with the elements of the prior crime for which the defendant was convicted. *Id.* The categorical approach thus requires sentencing courts to consider the prior offense "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008).

The categorical approach is necessary for three reasons. First, it effectuates the ACCA's text, since "the language of [the ACCA] generally supports the inference that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to facts underlying the prior convictions." *Taylor*, 495 U.S. at 600. Second, the categorical approach avoids the potential Sixth Amendment violations that could occur if sentencing

judges were permitted to make “a disputed finding of fact about what the defendant and state judge must have understood as the factual basis” of the state conviction. *Shepard v. United States*, 544 U.S. 13, 25 (2005) (plurality opinion). Third, the categorical approach avoids the “practical difficulties and potential unfairness” that would result if sentencing courts were free to draw conclusions about the facts underlying each state conviction, rather than considering only the elements that were necessary to sustain that conviction. *Taylor*, 495 U.S. at 601.

**B. The Court Has Adopted A Modified Categorical Approach For Alternative-Element (“Divisible”) Statutes.**

This Court has modified the categorical approach in “a narrow range of cases where a jury was actually required to find all the elements” of the federal offense. *Taylor*, 495 U.S. at 602.

That circumstance arises, the Court has explained, when the statute under which the defendant was convicted “refers to several different crimes” by defining some of its elements in the alternative. *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009). For example, in *Nijhawan*, the Court discussed a Massachusetts statute for “Breaking and Entering at Night,” which criminalizes breaking into four alternative places: a “building, ship, vessel or vehicle.” *Id.* at 35. Because the prosecution could obtain a conviction by proving any one of these four elements, the Court explained, the statute establishes several distinct crimes. *Id.* Significantly, only some of those crimes constitute generic burglary: violations involving one of the statute’s alternative elements (a building) would amount to generic

burglary, whereas other violations (*e.g.*, involving a vessel) would not. *Id.*

The mere fact of conviction under such an alternative-element statute (sometimes called a “divisible” statute) will not reveal which of the various crimes defined by the provision was the basis of the defendant’s conviction. Ordinarily, under the categorical approach, that would preclude the conclusion that the defendant had been convicted of generic burglary and bar an ACCA enhancement.

But the Court modified the categorical approach for the “narrow range of cases” presenting this problem. *Taylor*, 495 U.S. at 602. The Court’s “modified” categorical approach permits sentencing courts to “determin[e] which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction.” *Nijhawan*, 557 U.S. at 41. Under this approach, a sentencing judge may look to a limited set of documents – the so-called *Shepard* documents – to determine which of the alternative crimes was the basis of the conviction. *See Shepard*, 544 U.S. at 16 (permitting courts to examine for this purpose “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented”); *see also Nijhawan*, 557 U.S. at 35. Having determined which combination of the statutory elements was the basis of the prior conviction, the trial court can then compare those elements with the elements of the ACCA predicate offense.

Accordingly, as its name suggests, the *modified* categorical approach is a modification of the way in

which a categorical inquiry is conducted, not a repudiation of the basic premises of the categorical approach. It simply permits the sentencing court to examine the record of conviction to resolve an ambiguity about which offense, when a single statutory provision defines multiple offenses with alternative elements, the defendant was actually convicted of.

**C. The Ninth Circuit Extended The Modified Categorical Approach To Missing-Element Statutes And Revised The Nature Of Its Inquiry.**

Like the statute discussed in *Nijhawan*, the California burglary statute at issue here lists a series of places that can be burglarized, some of which could not form the basis of generic burglary. See Cal. Penal Code § 459 (1978). It is common ground that sentencing courts may apply the modified categorical approach to determine whether a defendant was convicted of burglarizing a building or structure (which would amount to generic burglary) instead of a vehicle (which would not). *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 926 (9th Cir. 2011) (en banc).

However, the California burglary statute differs from generic burglary in a second respect as well. Whereas generic federal burglary requires that the defendant's entry be "unlawful or unprivileged," that element is entirely missing from California's burglary statute. A defendant may be convicted of burglary under California law without any showing that his entry was unlawful. See, e.g., *People v. Salemmie*, 2 Cal. App. 4th 775, 780 (1992) (lawfully entering a



store during business hours with intent to steal constitutes burglary in California).

A traditional application of the modified categorical approach in such a case would preclude a sentence enhancement. Because the element of unlawful or unprivileged entry is missing altogether from the state statute, there is no combination of the elements of California burglary that will add up to generic burglary as defined by federal law. The modified categorical approach cannot, therefore, yield a determination that a particular defendant's conviction rested on elements constituting generic burglary.

In *Aguila-Montes*, the Ninth Circuit acknowledged that this Court has never applied the modified categorical approach to statutes that omit an element altogether (so called "missing-element statutes"), and that this Court's precedent "provides support for limiting the modified categorical approach to divisible statutes." 655 F.3d at 931. The court nonetheless concluded that sentencing courts have the authority to apply a "revised modified categorical approach" to missing-element statutes. *Id.* at 940.

Specifically, the Ninth Circuit held that a sentencing court may conclude that a defendant was convicted of generic burglary, even under a state statute missing an essential element of the federal offense, if the court is "confident" that "in the course of finding that the defendant violated the statute of conviction . . . the factfinder [was] *actually required to find the facts satisfying* the elements of the generic offense." 655 F.3d at 936. The Ninth Circuit acknowledged that in a missing-element case, a jury



would never be charged that it must find the missing element in order to convict. *See id.* at 929. But the court hypothesized that it may be possible to determine that, given the prosecutor's "theory of the case," the jury must have found facts that would satisfy the missing element. *Id.* at 937.

The Ninth Circuit recognized that this inquiry differs dramatically from the one authorized by the categorical approach, allowing a court to do precisely what the categorical approach was designed to avoid – examine the facts underlying a prior conviction. *Aguila-Montes*, 655 F.3d at 928-29. But it reasoned that the *Taylor* line of cases allows sentencing courts to "consider[] to some degree the factual basis for the defendant's [state] conviction," so long as the inquiry is confined to (i) examining the "limited universe of *Shepard* documents," and (ii) discerning "what the jury must have found" (as opposed to what the sentencing court believes the facts to be). *Id.* at 935.

## **II. The Modified Categorical Approach Does Not Apply To Missing-Element Statutes.**

The Ninth Circuit's approach to enhancing sentences based on prior convictions that are missing elements of their federal counterparts bears little resemblance to the categorical approach. The categorical approach asks only what the elements of the statute of the prior conviction were. But under the Ninth Circuit's approach to missing-element statutes, the elements of the crime of conviction become virtually irrelevant: depending on the factual allegations of a particular case, a defendant convicted of trespass or identity theft could be found to have been convicted of burglary. All that is required is that the sentencing court be confident that the jury

accepted the prosecution's theory of the case, and that based on those facts, the jury would have convicted the defendant in a hypothetical burglary prosecution.

That approach has no basis in the decisions of this Court or the text of the statute. Moreover, it must be rejected to avoid rendering the statute unconstitutional as applied to a great many cases (including this one) and to mitigate the practical difficulties and risk of unfairness that led this Court to adopt the categorical approach in the first place.

**A. This Court's Cases Foreclose Applying The Modified Categorical Approach To Missing-Element Statutes.**

This Court has applied the modified categorical approach only to alternative-element statutes. See Petr. Br. 19-26 (collecting cases). The principles animating those cases preclude the Ninth Circuit's expansion of the modified categorical approach to missing-element statutes.

1. The reasons that this Court adopted both the categorical approach, and a limited modification of it, require restricting the modified categorical approach to alternative-element statutes.

The categorical approach represents this Court's "conclusion about the best way to identify generic convictions in jury cases, while respecting Congress's adoption of a categorical criterion that avoids subsequent evidentiary enquiries into the factual basis for the earlier conviction." *Shepard v. United States*, 544 U.S. 13, 20 (2005); see also *James v. United States*, 550 U.S. 192, 202 (2007); *Taylor v. United States*, 495 U.S. 575, 600 (1990). The

modified categorical approach is not a repudiation of that conclusion. To the contrary, the Court has always treated the modified categorical approach as part of the categorical approach, not as an occasion to engage in the kind of factual inquiry that the categorical approach was adopted to avoid. See *Taylor*, 495 U.S. at 602; see also *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007) (characterizing the modified categorical approach as a “step of the *Taylor* inquiry”).

As traditionally applied to alternative-element statutes, the modified categorical approach is consistent with the imperatives of the categorical approach. As in any application of the categorical approach, a sentencing judge applying the modified categorical approach to an alternative-element statute is not seeking to determine the conduct underlying the conviction; she is only ascertaining which of several offenses defined in a single statutory provision is the basis of the conviction.

Applying that traditional modified categorical approach to missing-element statutes is pointless. By definition, no combination of statutory elements in such a statute will ever result in a conviction for the ACCA predicate offense. Accordingly, to permit enhancements in cases like this one, the Ninth Circuit has not only extended the modified categorical approach to a new kind of statute, but also has fundamentally altered the nature of the inquiry. Rather than ask which *elements* of the California statute were found by the jury, the Ninth Circuit asks what *other facts* the jury presumably found based on the prosecutor’s allegations or the defendant’s admissions in a particular case. That is

precisely the kind of “hypothetical” inquiry the Court rejected in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2586 (2010) (a federal immigration judge may not “enhance the state offense of record just because facts known to [her] would have authorized a greater penalty under either state or federal law”).

2. The Ninth Circuit nonetheless purported to find support for its approach in this Court’s statement that the modified categorical approach is intended to discern the facts a jury was “actually required” to find, or the facts a conviction “necessarily rested on.” *United States v. Aguila-Montes*, 655 F.3d 915, 935-36 (2011) (en banc) (quoting *Taylor*, 495 U.S. at 602, and *Shepard*, 544 U.S. at 21). The Ninth Circuit understood this language to permit inquiry not only into the *elements* of the state offense, which the jury necessarily found, but also additional “*facts* the conviction ‘necessarily rested’ on in light of the [prosecution’s] theory of the case.” *Id.* at 937 (emphasis added). That interpretation is unsupportable.

The only facts a jury is “actually required” to find in order to convict are the elements of the offense. See, e.g., *Patterson v. New York*, 432 U.S. 197, 205-06 (1977). As a consequence, a conviction only “necessarily rest[s]” on those elements. The Ninth Circuit thought that these phrases had a broader meaning, encompassing subsidiary facts a jury must have found in a particular case in order to find the defendant guilty. But that reading disregards the context of the Court’s statements. In *Taylor*, this Court said:

We therefore hold that an offense constitutes “burglary” for purposes of a § 924(e) sentence

enhancement if either its statutory definition substantially corresponds to “generic” burglary, or the charging paper and jury instructions actually required the jury to find *all the elements* of generic burglary in order to convict the defendant.

*Taylor*, 495 U.S. at 602 (emphasis added).

The Ninth Circuit stated that by “actually required,” the Court “c[ould] not mean ‘actually required by specific words in the statute of conviction.’” *Aguila-Montes*, 655 F.3d at 936. But that is precisely what the Court meant. The Court had just given an example of what it had in mind, pointing to an alternative-element statute that “include[d] entry of an automobile as well as a building.” *Taylor*, 495 U.S. at 602. It explained that the modified categorical approach would be appropriate in such a case because a jury “necessarily had to find” one of those elements (entry into a car or a building) in order “to convict.” *Id.* The modified categorical approach was thus strictly cabined by examining the alternative elements set forth in the statute, not facts underlying a jury verdict.

*Shepard* likewise focused on elements. There, the Court simply applied the principles established in *Taylor* to convictions based on guilty pleas. *Shepard*, 544 U.S. at 19. Rather than instructing lower courts to look to the jury instructions to decide which of the statute’s alternative elements the jury was “actually required” to find, the Court instructed courts to review the plea colloquy to decide which elements of the state statute the conviction “necessarily rested on.” *Id.* at 21 (internal quotation marks omitted); see also *United States v. Shepard*, 348 F.3d 308, 309 &



n.1 (1st Cir. 2003) (describing the alternative elements at issue in *Shepard*).

**B. Applying The Modified Categorical Approach To Missing-Element Statutes Is Inconsistent With The Text Of The ACCA.**

Even if this Court's precedents were unclear – and they are not – the text of the ACCA would preclude the Ninth Circuit's approach.

As this Court has noted, the ACCA “refers to ‘a person who . . . has three previous *convictions*’ for – not a person who has committed – three previous violent felonies or drug offenses.” *Taylor*, 495 U.S. at 600 (emphasis added) (quoting 18 U.S.C. § 924(e)(1)).<sup>2</sup> The word “conviction” is fatal to the Ninth Circuit's interpretation of the statute.

When a defendant is convicted under a statute that lacks one or more of the elements of generic burglary, it is simply impossible to say that he nonetheless has a “conviction” for generic burglary. He may have committed acts that could have supported a conviction for burglary. But there is a world of difference between having *committed* acts

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<sup>2</sup> Likewise, the statute requires a conviction that “is burglary,” 18 U.S.C. § 924(e)(2)(B)(ii), which most naturally “refers to the elements of the statute of conviction, not to the facts of each defendant's conduct,” *Taylor*, 495 U.S. at 600-01. Section 924(e)(2)(B)(i), this Court has noted, similarly “defines ‘violent felony’ as any crime punishable by imprisonment for more than a year that ‘has as an element’ – not any crime that, in a particular case, involves – the use or threat of force.” *Id.* at 600 (quoting 18 U.S.C. § 924(e)(2)(B)(i)).



that constitute burglary and having been *convicted* of that crime. Most clearly, someone who broke into a home to steal a television, but was never prosecuted, was not “convicted” of burglary. The same is true of someone who burglarized a home but was prosecuted for something else – the burglar who is charged only with speeding on his way home from the crime scene does not have a “conviction” for burglary, even if he admitted to the crime when the police pulled him over. Likewise, in this case, even if petitioner had admitted that he engaged in conduct that would amount to generic burglary, he was not convicted of that offense. Instead, he was convicted under a California statute that, while labeling his offense “burglary,” defines that crime in a way that omits an essential element of the generic crime.<sup>3</sup>

The Ninth Circuit has nonetheless concluded that so long as a judge is confident that a defendant admitted (or a jury found) all of the facts that would be necessary to sustain a generic burglary conviction, that is close enough. But a conviction requires more than findings of fact. A judge cannot find a defendant guilty of burglary when all he has pleaded guilty to is identity theft, even if the defendant does not dispute in his plea colloquy that he obtained the victim’s driver’s license by breaking into a house. To obtain a conviction for the more serious offense, the

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<sup>3</sup> Had Congress wanted to, it could have drafted a statute that focused upon the facts underlying past convictions. See, e.g., *Nijhawan v. Holder*, 557 U.S. 29, 38-39 (2009) (explaining that Congress intended a circumstance-specific approach in 8 U.S.C. § 1101(a)(43)(M)(i), which references prior crimes “in which the loss to the victim or victims exceeds \$10,000”).

prosecution must do more than secure assent to the requisite facts – it must charge the defendant with the greater offense, and if the defendant chooses not to plead guilty to that distinct crime, it must prove all of the elements of the higher crime to a jury beyond a reasonable doubt.

**C. Applying The Modified Categorical Approach To Missing-Element Statutes Would Render The ACCA Unconstitutional In Many Applications.**

The Ninth Circuit's interpretation would also render the ACCA unconstitutional as applied in a great many cases, including this one.

*1. The ACCA Is Constitutional Only To The Extent That It Limits Judicial Fact-Finding To Ascertaining The Fact Of A Prior Conviction And Its Elements.*

The Sixth Amendment generally requires that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The ACCA subjects a defendant to a substantially greater maximum penalty if a federal sentencing judge makes a factual determination that the defendant has three prior convictions for predicate offenses. 18 U.S.C. § 924(e)(1). Accordingly, the ACCA would seem to violate the Sixth Amendment. The only reason it does not is that this Court has retained, at least for the time being, a limited exception to the general Sixth Amendment rule: a judge may find the “fact of a prior conviction.” *Apprendi*, 530 U.S. at 489-90 (carving

out that exception in light of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). The rationale for the exception is that the defendant already received the protections of the Sixth Amendment in the prior trial. *Appendi*, 530 U.S. at 488.

Accordingly, at best, the ACCA is constitutional only to the extent it is construed to restrict judicial fact-finding to the narrow limits of the *Almendarez-Torres* exception.

2. *The Traditional Application Of The Modified Categorical Approach To Alternative-Element Statutes Falls Within The Almendarez-Torres Exception.*

Strictly speaking, an enhancement under the ACCA does not depend simply on the “fact of a prior conviction” – a court must find the fact of a *particular kind* of conviction, in this case burglary. But deciding *which* crime a defendant was previously convicted of does not exceed the bounds of the *Almendarez-Torres* exception. For that reason, the categorical approach falls comfortably within the exception. Under the categorical approach, the sentencing judge “look[s] only to the fact of conviction,” as permitted by *Almendarez-Torres*, and “the statutory definition of the prior offense” to determine its elements, *Taylor*, 495 U.S. at 602, a legal rather than a factual inquiry, see *James v. United States*, 550 U.S. 192, 214 (2007).

The modified categorical approach, as applied by this Court to alternative-element statutes, likewise falls within the permissible bounds of the *Almendarez-Torres* exception. Its only function is to assist the sentencing court in the first step of the

categorical approach: helping to identify *which* state crime, among the several defined in the alternative-element statute, constituted the actual crime of conviction. Having identified the elements of that crime, the court simply compares those elements to the elements of the ACCA predicate.

Under both versions of the categorical approach, then, the federal sentence enhancement is predicated entirely on facts that the Sixth Amendment required the prosecution to prove beyond a reasonable doubt to the jury in the prior proceeding.

3. *Applying The Ninth Circuit's Version Of The Modified Categorical Approach To Missing-Element Statutes Exceeds The Bounds Of The Almendarez-Torres Exception.*

The Ninth Circuit's version of the modified categorical approach permits a sentencing court to go well beyond determining the fact of a prior conviction. Indeed, the Ninth Circuit developed its rule precisely because it recognized that the fact of a prior California burglary conviction, standing alone, cannot support an ACCA enhancement. *Aguila-Montes*, 655 F.3d at 917, 939.

The Ninth Circuit's approach therefore requires the sentencing court to examine the record of conviction to identify *facts* about what the defendant *did* – in this case, whether the defendant broke into the grocery store or simply walked in during normal business hours. But *Apprendi* made clear that whatever continuing validity *Almendarez-Torres* may have, it does not permit inquiry into the “*commission of the offense*.” *Apprendi*, 530 U.S. at 496 (emphasis added). Yet that is exactly what the Ninth Circuit

permits, asking not what the elements of the crime of conviction were, but how the defendant committed the offense in this particular case and whether those subsidiary facts would constitute generic burglary.

The Sixth Amendment problem is not eliminated by requiring a judge to ask what subsidiary facts the original jury must have found, rather than allowing a judge to find facts anew. The Sixth Amendment contemplates only one way of determining what facts a jury found – charging the jury that it must unanimously find the facts necessary to justify conviction beyond a reasonable doubt. Reading the tea leaves to surmise what *else* the jury may have believed is a fool's errand; relying on the facts so surmised to increase the maximum statutory punishment for a crime is a Sixth Amendment violation.

The only reason this Court has permitted any reliance at all on the results of a prior criminal proceeding is because of the “certainty that procedural safeguards attached to any ‘fact’ of prior conviction.” *Apprendi*, 530 U.S. at 488; *see also Jones v. United States*, 526 U.S. 227, 249 (1999). But a fact that is not an element of the offense is frequently not subject to “the adversarial process that our system counts on to produce just results.” *Strickland v. Washington*, 466 U.S. 668, 696 (1984). The only thing a jury must agree upon unanimously, and the only facts the government must prove beyond a reasonable doubt, are the facts that constitute elements of the offense. *Patterson v. New York*, 432 U.S. 197, 210 (1977). Those protections do not apply to every fact a sentencing court may later conclude



the jury must have found. As Justice White once explained:

In the case of burglary, for example, the manner of entering is not an element of the crime; thus, *Winship* would not require proof beyond a reasonable doubt of such factual details as whether a defendant pried open a window with a screwdriver or a crowbar. It would, however, require the jury to find beyond a reasonable doubt that the defendant in fact broke and entered, because those are the "fact[s] necessary to constitute the crime."

*Schad v. Arizona*, 501 U.S. 624, 656-57 (1991) (White, J., dissenting) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)); see also *Richardson v. United States*, 526 U.S. 813, 817-18 (1999). For a judge to later enhance a defendant's sentence for a subsequent crime on the grounds that the jury must have believed the defendant used a crowbar violates the Sixth Amendment.

The Sixth Amendment problems with the Ninth Circuit's approach are no less severe if a judge asks what facts the defendant admitted in the plea colloquy. Indeed, in *Shepard* this Court specifically rejected the Government's suggestion that a sentencing judge could "make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea," noting that this approach "raises the [Sixth Amendment] concern underlying *Jones* and *Apprendi*." *Shepard*, 544 U.S. at 25 (plurality opinion); *id.* at 27-28 (Thomas, J., concurring in part and concurring in the judgment).



Ignoring that caution, the Ninth Circuit assumes that the Constitution permits a sentence enhancement based on any fact a defendant states or admits (or, in this case, fails to object to) during a plea colloquy. This assumption is simply wrong. The constitutional question is not whether the defendant admitted some fact in a prior proceeding; it is whether the defendant knowingly and intelligently waived his Sixth Amendment right to a jury determination of that fact. *See Jones*, 526 U.S. at 242. If a defendant charged with trespass pleads guilty, but during the course of the plea colloquy admits to having broken into a home in order to steal a television, a court may not convict the defendant of burglary instead on the grounds that the defendant admitted to all the elements of the more serious offense.<sup>4</sup>

That is because in pleading guilty to the trespass charge the defendant waives his right to a jury determination of only the elements of trespass. *See United States v. Broce*, 488 U.S. 563, 569 (1989). A defendant does not knowingly and intelligently waive his right to contest a fact that is not an element in the present case and may only become consequential years later in a subsequent proceeding. *See, e.g., Mitchell v. United States*, 526 U.S. 314, 324 (1999) ("A waiver of a right to trial with its attendant

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<sup>4</sup> If admission to a fact alone were sufficient, a court could direct a verdict of guilty any time a defendant admitted at trial to facts establishing the elements of an offense. But that obviously is not the law. *See, e.g., United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 410 (1947).

privileges is not a waiver of the privileges which exist beyond the confines of the trial.”).

Such was precisely the case here. Before the California court, petitioner remained silent in the face of an assertion of fact that was neither an element of the crime to which he was pleading nor material in any way to his state conviction or sentence. Given that fact’s irrelevance, his silence did not constitute a knowing and intelligent waiver of any Sixth Amendment right to have that fact determined by a jury when it eventually did become relevant in a later federal prosecution. An interpretation of the ACCA that leads to any other result would render the statute unconstitutional.

**D. Applying The Modified Categorical Approach To Missing-Element Statutes Poses Significant Practical Difficulties And Risks Manifest Unfairness.**

The Ninth Circuit recognized that applying ACCA enhancements is so complicated that “over the past decade, perhaps no other area of the law has demanded more of our resources.” *Aguila-Montes*, 655 F.3d at 917. Yet its proposal to expand the inquiry performed by sentencing judges exacerbates, rather than resolves, the “practical difficulties and potential unfairness” of applying the ACCA. *Taylor*, 495 U.S. at 601.

*1. The Ninth Circuit’s Approach Raises Intractable Practical Difficulties.*

a. The Ninth Circuit’s approach requires federal sentencing judges to parse aged records of convictions to determine whether they contain proof that a jury found or a defendant admitted facts that, although

not elements of the offense of conviction, nonetheless satisfy the missing element of the federal offense. But the limited information in the records of conviction will often be vague or contested. Relying on this evidence at sentencing proceedings risks creating undesirable “mini-sentencing-trials” regarding the factual underpinnings of past convictions. *Shepard*, 544 U.S. at 36 (O’Connor, J., dissenting).

The practical difficulties created by the Ninth Circuit’s approach arise in both the plea bargain and jury trial context.

*Plea Bargains:* The facts of this case illustrate the perils of the Ninth Circuit’s approach in the plea bargaining context. In this case, the prosecutor stated that petitioner committed “breaking and entering of a grocery store.” Pet. App. 40a. Petitioner neither explicitly accepted nor objected to these statements. The Ninth Circuit assumed that he remained silent because the statements were true, but his silence could just as easily reflect a justifiable belief that these facts were irrelevant to his conviction and sentence. Yet thirty years later a federal judge found Descamps’ silence sufficient to prove that he had entered a structure unlawfully.

The problems created by the Ninth Circuit’s rule are heightened when plea agreements incorporate extraneous documents by reference. *See, e.g., People v. Holmes*, 32 Cal. 4th 432, 441 n.8 (2004) (encouraging defendants entering plea agreements to stipulate “to a factual basis to be accompanied by reference to a police report, reference to the probation report or preliminary hearing transcript, or reference to grand jury testimony” (citations omitted)). Not

only are the potential grounds for dispute over the meaning of the documents multiplied, so too is the risk of error. Consider, for example, a person who is arrested with items stolen from a home. The police report might suggest the defendant is guilty of both burglary and receipt of stolen property. But later investigation may exonerate the defendant of participation in the burglary, leading to a guilty plea to the offense of receiving stolen goods. As is common in California, the defendant might stipulate to the police report of his arrest as providing a factual basis for his plea, even though some of the report's implications are not accurate. After all, the report's suggestion that the defendant was guilty of burglary would be irrelevant to the acceptance of the plea. But years later, a judge reviewing this police report might erroneously conclude that the defendant committed burglary and apply a sentence enhancement not justified by the defendant's conduct.

It may be that courts could eventually develop rules that minimize the risk of error. Judge Berzon, for example, suggested that when there are legitimate grounds to dispute the best inference to be drawn from the record of conviction, due process might require holding a hearing to allow the defendant to present contrary evidence. *Aguila-Montes*, 655 F.3d at 962 (Berzon, J., concurring in the judgment). But such "mini-sentencing-trials" are precisely what the categorical approach was designed to avoid. The work required to develop a body of law to govern judicial consideration of the uncounseled, unfocused statements in decades-old plea colloquies simply is not worth the candle.

*Jury Verdicts:* The practical difficulties of the Ninth Circuit's rule are no less severe in the context of jury verdicts. A general jury verdict of guilty demonstrates only that the jury found that the defendant committed all the elements of the charged crime. It is not an affirmation of the government's theory of the case or even the allegations of the charging documents. See *Richardson v. United States*, 526 U.S. 813, 817 (1999).

The Ninth Circuit hypothesizes that sometimes a court can be confident that the jury necessarily found a fact that was not an element of the offense of conviction because that fact was essential to the prosecution's "theory of the case." *Aguila-Montes*, 655 F.3d at 937. But in many cases, it may be far from clear what theory of the case the jury adopted. For example, the prosecution may allege that a defendant broke into an acquaintance's home and stole some jewelry. The defendant might claim that he was invited into the home and was given jewelry as a gift. In California, a jury could convict the defendant of burglary if they believed that he stole the jewelry, even if they accepted that he was invited into the home. In such a case, the fact of conviction alone does not prove that the jury accepted the part of the prosecution's theory of the case – unlawful entry – that is critical to the validity of an ACCA sentence enhancement.

b. Even when the prosecutor's theory of the case is uncontroverted, that does not prove that every fact on which the theory relies is therefore true. A defendant generally has no incentive to challenge facts that are unrelated to an element of the charged offense. During plea colloquies, a defendant may



choose not to contest non-elemental facts because they are irrelevant to his sentence, or because he does not want to risk offending the judge about to sentence him with protests regarding superfluous issues. In jury trials, a defendant may withhold even compelling evidence contesting non-elemental facts to avoid confusing the jury. In fact, evidentiary rules may bar him from presenting such evidence at trial. See Fed. R. Evid. 401 (providing that evidence is only relevant, and therefore admissible, if it is “of consequence in determining the action”); *id.* 403 (excluding evidence if it may “confus[e] the issues”). Thus, a defendant charged with burglary in California for entering a store with intent to steal may not have the opportunity, much less the incentive, to present evidence that the store was open for business at the time of his entry.

2. *The Ninth Circuit’s Approach Will Often Be Manifestly Unfair.*

Opening the records of state court guilty pleas to later judicial fact-finding not only raises issues of administrability and reliability, it is also unfair to both criminal defendants and state prosecutors.

This Court has recognized that even when evidence might support a conviction for a greater crime, the prosecutor and defendant may legitimately agree to a plea to a lesser offense. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.”). In such a circumstance, “it would seem unfair to impose a sentence enhancement as if the defendant had



pleaded guilty to burglary.” *Taylor*, 495 U.S. at 602. Allowing a federal sentencing judge to base a sentence enhancement on a defendant’s conduct, rather than what he pleaded guilty to, would undermine the finality and mutual benefit of these agreements.

For example, plea agreements for non-citizen defendants frequently reflect a careful calibration of the defendant’s and the state’s interests, with some plea deals specifically structured to avoid disproportionate immigration consequences. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (“By bringing deportation consequences into [the plea bargaining] process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.”); see also *St. Cyr v. INS*, 533 U.S. 289, 323 (2001). To allow a federal court to subsequently treat the resulting conviction as if the prosecutor had made the opposite choice “would denigrate the independent judgment of state prosecutors to execute the laws of those sovereigns.” *Carachuri-Rosendo*, 130 S. Ct. at 2588; see also *Oregon v. Ice*, 555 U.S. 160, 170 (2009) (“[T]he authority of States over the administration of their criminal justice system . . . lies at the core of their sovereign status.”).

**E. If There Is No Way To Distinguish Among Applications Of The Modified Categorical Approach, It Should Be Abandoned, Not Expanded.**

The Ninth Circuit concluded that an expansive application of the modified categorical approach is acceptable because there is no conceptual difference between missing-element statutes and “divisible”

statutes. *Aguila-Montes*, 655 F.3d at 927. This is not correct, but even if it were, that would be reason to abandon the modified categorical approach completely, not expand it dramatically.

1. According to the Ninth Circuit, “[t]he only conceptual difference between a divisible statute and a non-divisible statute is that the former creates an *explicitly* finite list of possible means of commission, while the latter creates an *implied* list of every means of commission that otherwise fits the definition of a given crime.” *Aguila-Montes*, 655 F.3d at 927. To take the Ninth Circuit’s example, a statute criminalizing “harmful contact,” by this logic, criminalizes a hypothetical list of types of harmful contact, such as simple battery, vehicular assault, and aggravated assault with a deadly weapon. *Id.* The Ninth Circuit reasons that because this Court has endorsed the use of *Shepard* documents to determine which “statutory phrase” a defendant was convicted of violating, *see Johnson v. United States*, 130 S. Ct. 1265, 1273 (2010), a similar inquiry is permissible to determine what part of an “implied list” of criminal conduct a defendant engaged in.

The Ninth Circuit ignores the critical feature of alternative-element statutes that distinguishes them from missing-element statutes: in an alternative elements case, the sentencing court can be confident that, because they are elements of the prior offense, the facts upon which the ACCA enhancement depends have been the subject of sustained and deliberate attention in the prior proceeding. The facts supporting the ACCA enhancement necessarily will have been unanimously found by a jury beyond a reasonable doubt after the careful scrutiny that only

arises when a judge instructs the jury that the fact is an element of the offense. No such confidence is warranted with respect to other facts that the prosecution might mention at some point in the proceedings.

Accordingly, the modified categorical approach must be limited to statutes that enumerate alternative *elements*. It cannot apply when a statute merely enumerates a "list of possible means of commission" of an element of an offense, as would happen under a theoretical statute that criminalized use of a "weapon," then defined that term to include a "gun, axe, sword, baton, slingshot, knife, machete, bat,' and so on." *Aguila-Montes*, 655 F.3d at 927. Assuming that under such a statute, the type of weapon used would not be an *element* of the offense, but simply one of several means by which the government could prove the element of use of a "weapon," the jury would not be required to unanimously agree whether the defendant had used any particular weapon, say a gun, in the commission of the state offense. *See Richardson*, 526 U.S. at 817. If a federal sentence enhancement, however, applied only to a conviction for a prior firearms offense, the modified categorical approach could not be applied to decide whether the prior conviction actually involved a gun as opposed to some other kind of weapon, because that fact was not an element of the prior offense of conviction and was never subject to the constitutional protections that attach to elements. To allow a subsequent sentencing court to decide a fact (the use of a gun) that was not an element of the prior offense would, for all the reasons described above, run afoul of the text of the statute and frequently violate the Sixth Amendment.

2. All that said, if the Ninth Circuit were correct that there is no logical distinction between alternative- and missing-element statutes, that would be reason to jettison the modified categorical approach, not expand it. As noted above, allowing sentencing judges to find sentence-enhancing facts in missing-element situations contradicts the text of the ACCA, raises grave constitutional concerns, and creates substantial practical difficulties and potential unfairness. If, as the Ninth Circuit asserts, there is no conceptual difference between statutes that are missing an element and statutes that have alternative elements, then the same statutory, constitutional, and pragmatic concerns that require limiting the modified categorical approach would also require eliminating it.

In fact, abandoning the modified categorical approach altogether would avoid compounding the constitutional uncertainty surrounding the practice of enhancing sentences based on prior convictions not pleaded in indictments and proven at trial. Although this practice was endorsed in *Almendarez-Torres*, that decision "has been eroded by this Court's subsequent Sixth Amendment jurisprudence." *Shepard*, 544 U.S. at 27 (Thomas, J., concurring in part and concurring in the judgment). Given the uncertain constitutional foundation upon which ACCA sentence enhancements rest, limiting judicial fact-finding into past convictions to a strictly categorical inquiry would mitigate the tension between the statute and the Sixth Amendment. *Cf. id.* at 25-26 (plurality opinion) (recognizing that the doctrine of constitutional avoidance supports narrow construction of the modified categorical approach).

**CONCLUSION**

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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